

**ABI response to 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**

(Ref. CESR/09-785)

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General remarks

The Italian Banking Association (ABI), representing the entire Italian banking industry with over 800 member banks and Eur 390bn of assets under management, welcomes this further opportunity to contribute to the definition of CESR's technical advice to the European Commission on the level 2 measures relating to mergers of UCITS, master-feeder UCITS structure and cross notification of UCITS.

One of ABI's main goals is to contribute actively making more efficient and effective the regulation on investment services and asset management, seeking to simplify the relevant obligations the industry/financial participants has/have to adhere and comply with, as well as ensuring protection for retail investors consistently to the level of their financial education.

ABI agrees with this consultation paper which properly sets proposals, in all the relevant areas, for the mentioned solutions aimed at reducing costs currently born by UCITS and their management companies.

However, our considerations highlighted below suggest also the need for further adjustments on:

- the information to be provided to unitholders in case of mergers of UCITS;
- the timeframe(s) by which the feeder UCITS shall provide information to its unitholders on the course of action to be taken (see Box 5, pt 5, or answer to question 15-16 below);
- the role of the feeder UCITS' depositary;
- the information to be published by each Member State about the applicable regulation on UCITS' marketing;
- the necessary steps required by the notification procedure to inform the host Member State authority about the updates that the relevant offering documents regularly undergo.

ABI is pleased to provide CESR with some cost estimates (as well as potential savings) borne by the current procedures for marketing UCITS, transmitting the relevant notifications, etc.

Answers to CESR's questions notify.

SECTION I: MERGERS OF UCITS

Contents and format of the information

Questions 1-5

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?

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

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

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

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)?

Answers: ABI agrees with CESR's proposal relating to the information to be provided to unitholders, but it considers:

- necessary a further degree of detail in identifying which information is relevant to the unitholders of the receiving UCITS. As a matter of fact, when a merger doesn't imply modifications of the receiving UCITS, we believe that information to be provided to unitholders of the receiving UCITS should be avoided or limited to the description of the solutions adopted to ensure a fair application to the receiving UCITS' portfolio of a performance-related fee;
- that the information mentioned in point 4 b), "details in the context of the investment policy and strategy, a profile of the typical investor for whom the UCITS is designed" and in point 4 c), "details in the context of costs, a statement that all charges and expenses for both UCITS, based on the amount disclosed in their respective KIDs" duplicate the information reported in the KID. Therefore, it should be removed;
- that point 5(a), in Box 1, basically refers to such information that, in ABI's view, is too technical for investors to be easily understood. It would be appropriate for CESR to provide some further details as to which details it expects should be provided when asking for "how any accrued income in the merging UCITS is to be treated".
- necessary further details about the summary of the key points of the merger proposal and the information to be provided as per Box 1. In our view, this summary should be optional.

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?

Answer: ABI supports harmonised rules relating to the ways to provide information to unitholders in order to avoid differentiated national provisions which, in turn, could bear additional costs.

SECTION II: MASTER-FEEDER STRUCTURES

Agreement between feeder and master UCITS

Questions 7-8

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

Answer: ABI agrees with CESR proposals.

Question 9

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

Answer: Generally, in view of the fact the feeder UCITS is in a what-might-be-deemed-as "weaker" position than the master's, ABI considers that applying the feeder UCITS' jurisdiction law would be a preferable solution. However, the Association is aware that this approach could be a tad too rigid. Therefore, ABI views option B ("...as the parties may choose") as a preferable alternative, as it would also keep the regime more easily adaptable to the different scenarios master and feeder UCITS may (and will) come across.

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?

Answer: ABI agrees to leave these measures to each national law and regulation.

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?

Answer: ABI does not view this case as a source of significant additional costs.

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?

Answer: ABI agrees with CESR's proposals.

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?

Answer: ABI does not view this case as a source of significant additional costs.

Question 14

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

Answer: ABI agrees with CESR's proposals.

Liquidation, merger or division of a master UCITS

Questions 15-16

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

Answer: ABI deems as possible the case of a feeder becoming aware of its master's intention to liquidate, merge or sub-divide, before receiving a formal notice. Nonetheless, as unofficial information and/or documentation

do not allow the feeder UCITS to formally start off any procedure, ABI considers the proposed time-frames too short for the feeder to adopt any of the possible alternative solutions, as pointed out in Box 5.

Therefore, ABI strongly suggests CESR to recommend Member States' competent authorities to provide some specific regulation on the terms and time-frames within which these have to approve the relevant changes a feeder UCITS opts to implement in its rules as a consequence of a master's decision to liquidate, merge or sub-divide. Indeed, it has to be taken into account the nature of a master-feeder structure and, accordingly, adapt the necessary terms to modify feeder UCITS' rules as a consequence of the relevant changes of the master UCITS fund. Namely, there is a need for a specific regulation on feeder UCITS rules changes.

Questions 17-18

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?

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?

Answer: Having regard to the Italian regulation applicable to UCITS' rules changes, ABI views as too short the two-month term to allow a feeder to make a decision on the options presented as an alternative to be liquidated. Please, see above answer to questions 15-16.

Question 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?

Answer: Having regard to the Italian regulation applicable to UCITS' rules changes, ABI views as too short the one-month term to allow a feeder to make a decision on the options presented as an alternative to be liquidated. Please, see above answer to questions 15-16.

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?

Answer: ABI considers unlikely for an Italian feeder UCITS to adopt any decision alternative to being liquidated, unless a specific regulation is foreseen, consistently to our answer to questions n.15-16.

Agreement between depositaries

Questions 21-22

Do you agree with CESR's proposals for defining the content of the depositaries' agreement? Does Box 7 cover the right issues? Should other issues be addressed?

Answer: ABI agrees with CESR proposals, with exception to point 3(a) and point 4 in Box 7. Regarding point 3(a), it is not clear why there should be co-ordination of the involvement of both depositaries in relation to the procedure for calculating the NAV of each UCITS. Indeed, the feeder UCITS, in order to calculate the NAV on the shares/units (of the master UCITS) held in its (feeder) portfolio, should only need the NAV of such shares/units, and no further information should be necessary from the master UCITS. Accordingly, the feeder UCITS depositary should not be concerned as to how the NAV of the master UCITS is calculated and should not double up the control of such NAV computed by the master UCITS' depositary. With regards to point 4, it is unclear which kind of "depositary's report to unitholders" should be produced by the depositary (art. 61 of the Directive does not make reference to any report). Furthermore, the issue of the co-ordination of accounting period-end procedure is not strictly related to depositary banks. This is further addressed in Q&A n.30.

With particular regards to point n.5, Box 2, the divergences between EU Member States on how to report and to monitor breaches need to be taken into account. It must be clearly specified that the feeder UCITS' depositary can only receive information transmitted voluntarily by the master's depositary in accordance with rules imposed by national regulation of the master's. Anyway, the master UCITS' depositary should not be constrained/limited/forced to comply with rules which are not set by its own regulation.

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?

Answer: Generally, in view of the fact the feeder UCITS' depositary is in a what-might-be-deemed-as "weaker" position than the master's, ABI considers that applying the feeder UCITS depositary's jurisdiction law would be a preferable solution. However, ABI is aware that this approach could be a tad too rigid. Therefore, we view option B ("...as the parties may choose") as a preferable alternative, as it would also keep the regime more easily adaptable to the different scenarios master and feeder UCITS depositaries may (and will) come across.

Question 24

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?

Answer: ABI does not view this case as a source of significant additional costs. However, additional costs brought by cross-language translations and reception of communitarian regulations within national jurisdictions are likely to bear some issues when these agreements are being defined.

Reporting by the master UCITS depositary

Questions 25-26

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

Answer: ABI agrees with CESR's proposals on the irregularities to be reported by the depositary and it considers the interests of the master UCITS' unitholders adequately protected.

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?

Answer: ABI does not view this case as a source of significant additional costs. However, should CESR's proposals in Box 8 be implemented, additional costs (i.e. costs of managing communication between depositaries in case of errors, mistakes, or any violations) would definitely be significant, even if, at this stage, these would not be reasonably quantifiable.

Agreement between auditors

Questions 28-29

Do you agree with CESR's proposals in relation to auditor agreements? Which option do you prefer in relation to the national law and jurisdiction applicable to cross-border agreements?

Answer: ABI agrees with these proposals and strongly supports the adoption of option B.

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?

Answer: From an accounting perspective, it is necessary to consider not just year-end dates. The frequency for NAV calculation is important too. There could be a need to coordinate the master and the feeder UCITS on both the two aforementioned issues. However, in order to understand whether such coordination is actually necessary, and to what extent it is so, it should be clarified whether the feeder UCITS has to represent, in its accounting documents (or in the explanatory notes to be attached to such documents), what is held in the portfolio of the master UCITS.

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?

Answer: ABI does not view this case as a source of significant additional costs.

Question 32

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

Answer: ABI agrees with CESR's view.

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?

Answer: ABI does not agree with CESR proposal not to provide advice on level 2 measures on this issue, as this is regarded as a crucial subject. In ABI's view, the most suitable solution would consist of a provision for a master-feeder agreement (about the valuation of assets transferred in kind), which would explicitly include the possibility not to comply with their respective pricing policies.

ABI is of the opinion that CESR's general position not to define level 2 measures on the transfer and contribution in kind will eventually bear day-to-day complications to UCITS funds' and depositaries in complying to their business duties.

SECTION III: NOTIFICATIONS

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?

Answer: ABI regards as particularly important to provide information on the arrangements made for marketing UCITS cross-border through a combination of a narrative description and a series of references. It also considers crucial that references are translated in a language customary in the sphere of international finance.

As a matter of fact, one of the main changes of the UCITS IV Directive is to simplify as much as possible the notification procedure thanks to a new regime based on an exclusive relationship between the UCITS and its Member State competent authority and an easy, transparent, complete publication of the provisions regulating the activity of the marketed UCITS in the host Member State. The new regime will be more efficient if it enables UCITS marketed on a cross-border basis to avoid the high expenses due to legal consultants for identifying relevant provisions applicable in the host Member State.

Question 35

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?

Answer: Responses to an informal investigation run by ABI with its associate banks and management companies highlights that (for instance) a single legal consultancy on the regulation applicable to a foreign UCITS marketed in Italy stands at around Eur 2,000-3,000. These charges usually fall within the invoice "legal assistance/consultancy on notification procedures" as mentioned later at question n.37.

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?

Answer: The financial industry is interested in any solution able to make the relevant information and documentation easily, effectively and mutually available for both the competent Authorities of the home Member State and the host Member State.

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 of one-off and ongoing costs.

Answer: Costs of a notification process are currently composed of:

- legal expenses-charges, due to legal consultancy of the host Member State, estimated approximately at Eur 4,000-4,500 per UCITS on average per annum;

- translation costs for the whole offering documentation (prospectus, simplified prospectus), estimated at approximately Eur 1,000 per UCITS, on average, per annum;
- alternatively, combined legal and translation fees, amount to Eur 65,000, on average, per annum. This estimate refers to a sampled generic international company marketing around 100 UCITS internationally;
- costs born by the general update of the offering documentation are estimated at Eur 250,000 per annum and include the cost of depositing the offering documentation by the host member state competent authority, cost related to editing and printing of these documents, etc. This estimate refers to a sampled generic international company marketing around 100 UCITS internationally.

Questions 38-39-40

What would be the benefits of these proposals, compared to no prescription at level 2? Do you consider the notification letter (Annex I) satisfactory? Are there any other matters that it ought to cover? Do you have any comments on the draft attestation letter (Annex II)?

Answer: ABI agrees with the content of both Annex I and II, and it considers that no further issues ought to be covered.

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?

Answer: ABI considers that the current costs would be significantly reduced thanks to: (i) publishing information on the relevant provisions applicable to marketing units of UCITS across Member States, (ii) every step of the procedures being dealt with the home Member State competent authority and the relevant UCITS, (iii) achieving both an almost-standardised notification letter (Annex I) and an attestation for marketing of units of UCITS (Annex II). In particular, costs would considerably reduce, by more than halving, because:

- once the new procedure, requiring notifications to the home Member State authority, will actually be implemented, legal costs born by UCITS will be drastically reduced (as mentioned previously, our estimate is at around Eur 4,000-4,500 per UCITS);
- costs related to translations are estimated to reduce to a third of their current amount, as only the KID would be left to be translated in local languages;

- the overall process of editing and updating the relevant documentation would speed up as, according to the new regulation, it is no longer necessary to deposit by/transmit to the host Member State authority the relevant documentation. However, in order to be able to quantify the estimated savings, ABI deems as necessary some clarifications by CESR on article 93(7)(8) of the relevant Directive. In fact, as the article stands at points (7) and (8), it leaves room for discretion in its interpretation. ABI supports a standardised procedure for the notification of any amendments to the documents enclosed within the notification letter.

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?

Answer: ABI strongly supports the development of such an electronic system between the competent authorities, as it is crucial for the notification systems to work quickly, smoothly and effectively.

Question 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?

Answer: ABI agrees with all the measures listed in Box 11, with the exception to an aspect mentioned in point n.7, i.e. << ...instructing the UCITS to cease accessing the market in that State>>. In ABI's view, the measure proposed at point n.7 is too strict as, once a UCITS has transmitted all the relevant information to the home Member State authority, the responsibility to analyse and assess its completeness within 10 working days lays on the latter institution. Hence, in case of any incomplete information/documentation received by the host Member State authority will depend exclusively on technical (i.e. transmission) issues.

Therefore, should the documentation received by the host Member State authority result partially incomplete, ABI considers crucial the latter to inform the home Member State authority to instruct the UCITS to provide all the relevant missing information/documentation within 3 business days.

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?

Answer: ABI agrees with the proposed procedure.

Question 45

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

Answer: In ABI's view, it is appropriate to regulate the whole subject at level 2 in order to allow a homogeneously application in all EU Member States.