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Committee of European Securities Regulators (CESR)
11-13, Avenue de Friedland
75008 Paris

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AFG response to CESR's consultation paper Technical advice to the European Commission on level 2 measures relating to mergers of UCITS, master-feeder UCITS structures and crossborder notification of UCITS

The Association Française de la Gestion financière (AFG)[1] welcomes CESR's consultation on level 2 measures on mergers of UCITS, master-feeder UCITS structures and crossborder notification of UCITS.

It is worth noting that our working group dedicated to this matter counts over fifteen French investment management companies and is representative of the industry. It is made of entities that are varied in size (small or large), structure (entrepreneurial or belonging to French or foreign banking or insurance groups) and product range (plain vanilla funds, structured funds or both). Given that the French fund industry is the first one in the EU for the financial management of EU funds (wherever they are domiciled in the EU), the following comments are meaningful from a European perspective.

General comments

AFG generally agrees with the requirements proposed by CESR relating to the provision of information to unitholders where a merger is to be proposed or effected. However, we would like the information to be disclosed was set as an exhaustive list. It should not include the details of any differences in the rights of unitholders, as this would clearly go beyond the obligations set by the Directive. Besides, we believe that the provision of the KID would generate additional costs; instead of providing investors with the KID, we would suggest referring them to a website where this document is easily available.

[1] The Association Française de la Gestion financière (AFG)[1] represents the France-based investment management industry, both for collective and discretionary individual portfolio managements.

Our members include 409 management companies. They are entrepreneurial or belong to French or foreign banking or insurance groups.

AFG members are managing 2300 billion euros in the field of investment management, making in particular the French industry *the leader in Europe in terms of financial management location* for collective investments (with nearly 1300 billion euros managed from France, i.e. 23% of all EU investment funds assets under management), wherever the funds are domiciled in the EU, *and second at worldwide level after the US*. In the field of collective investment, our industry includes – beside UCITS – the employee savings schemes and products such as regulated hedge funds/funds of hedge funds as well as a significant part of private equity funds and real estate funds. AFG is of course an active member of the European Fund and Investment Management Association (EFAMA) and of the European Federation for Retirement Provision (EFRP). AFG is also an active member of the International Investment Funds Association (IIFA).

Regarding the medium through which the information is delivered to unitholders, we believe that management companies should not to be required to publish the information relating to the merger simultaneously through several channels and to be allowed to make good use of a website.

As far as master-feeder structures are concerned, AFG first advocates the application of the law of the Member State where the master is established to agreements between master and feeder UCITS, between their depositaries and between their auditors. Indeed, applying the law of the Member State where the feeder is established may prove unmanageable in cases where a master has feeders established in different Member States. Second, the list of items contained in these agreements should be exhaustive.

AFG believes that the treatment of all unitholders, whether they are invested in the feeder UCITS or directly in the master UCITS, should be equal. In this light, we cannot understand how the measures to protect the interests of unitholders investing directly in a master UCITS could be left to national law and regulation. Furthermore, we are of the opinion that investors in the feeder UCITS should be informed in case the master UCITS is being liquidated and that the feeder UCITS is considering different courses of action.

Regarding the report of irregularities by the master UCITS depositary, we believe that, in order to ensure a fair treatment of all investors in the master UCITS, unitholders that are not feeder UCITS should also be notified.

AFG is of the opinion that Member States should disclose in a concise and specific manner all information on laws, regulations and other provisions that specifically relate to the marketing of UCITS established in another Member State within their territories. In this aim, we suggest Member States could use a centralised system managed by CESR.

Furthermore, we think that Member States should not be allowed to impose additional or different requirements for marketing documents for items presented in the KID. In other words, the KID should suffice as a marketing document.

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Detailed comments

Section I - Mergers of UCITS

Chapter 1 - Contents and format of the information

AFG comments on Box 1

4.a – We propose to remove this provision as Article 43.3.c already provides for the disclosure of specific rights unitholders have in relation to the proposed merger. Moreover, requiring additional details of any differences in the rights of unitholders would go beyond the obligations set by the Directive.

6 – We believe that the information to be provided in accordance with paragraph (d) of Article 43(3) of the Directive should be set as an exhaustive list. Indeed, this would avoid legal uncertainty for management companies and ensure a better harmonisation among the Member States.

8 – We agree that a copy of the KID should be provided either as an integral part of the information document or as a free-standing document.

AFG comments on point 8 of explanatory text (p.7)

Some of our Members are concerned about the obligations set in this paragraph. Indeed, they think it would not be possible to make an efficient comparative analysis of the regulation or taxation existing in the countries of two UCITS.

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?

Please see above regarding our comments on CESR's proposals on the information to be given to unitholders.

No, we do not think that there is other information that is essential to unitholders.

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

We agree that a summary of the key points of the merger proposal should be optional for the management company (not for the regulator as such a situation might lead to legal uncertainty and/or a lack of harmonisation among the different 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.

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

Yes. The requirement to provide the KID to both the investors of the merging and of the receiving UCITS being set in the Directive, it will have to be complied with.

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)?

We cannot see much benefit in providing the KID to the investors of the receiving UCITS as they will already have received such information. Conversely, the requirement of providing them with the KID would entail significant costs (the cost of translation and publication will be multiplied by three).

Costs may also prove significant, depending on the information channel that management companies have to use. For instance, in some countries information relating to mergers has to be both communicated individually by post and published in national newspapers.

Chapter 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?

AFG is aiming at limiting the costs entailed by the provision of information relating to mergers to unitholders. Indeed, the cost of publication (for instance translation and publication) will be such that it might put management companies off implementing mergers, especially if investors have to be provided with a copy of the KID. Indeed, the provision of the KID may potentially treble the costs of providing such information.

For example, if the average cost of translating a one-page letter is 400 EUR and the average cost of publishing it amounts to 450 EUR (i.e. a total of 850 EUR in average for one page), the cost of publishing both the letter and the KID will total (400+450)*3=2,550 EUR in average. This amount will in turn have to be multiplied by the number of countries where the fund is distributed.

Consequently, we believe that management companies should be free to opt for the most cost efficient information channel (sending letters to unitholders can cost from 2,500 EUR to 100,000 EUR depending on the country and the number of unitholders).

Moreover, as publication of the information on a website is in accordance with the obligations set by the Prospectus Directive, the opportunity of using this information channel would ensure a level playing field between investment funds and other financial instruments.

In any case, management companies should not be required to publish the information simultaneously through different channels (for example, the information of unitholders by a letter should release them from the obligation of publication in a newspaper).

In conclusion, we do support an harmonised procedure at European level that would define a common rule on the information to provide investors. This would enable management companies to benefit from economies of scale. Incidentally, we believe that it would be more efficient for management companies to be able to refer unitholders to a website where the relevant information is available: the management company's website, a website centralised at national level or preferably a website managed by CESR.

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Section II - Master-feeder structures

Chapter 1 - Agreement between feeder and master UCITS

AFG comments on box 2

AFG does not understand why CESR rejects the application of the law of the Member State where the master is established on the basis that this might have adverse tax implications.

We strongly believe that applying the law of the Member State where the feeder is established may prove unmanageable in cases where a master has feeders established in different Member States, as the management company would then be in a situation whereby it has to deal with different pieces of legislation. We appreciate that one of the goals of the introduction of cross border master-feeder structures by the Directive is to simplify cross border procedures and make them more efficient, but this would only complicate them and make them dearer!

Furthermore, we are of the opinion that the application of the law of the Member State where the master is established would not affect investors' protection to the extent that investors that invest in the feeder UCITS are in a relationship with the feeder, not the master UCITS.

For all the above reasons, AFG calls for the application of the law of the Member State where the master is established in order to ensure a better harmonisation. We do not wish to leave the choice up to the parties of the agreement.

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

We believe that the list of items in the agreement between feeder and master UCITS should be exhaustive in order to reduce legal uncertainty and ensure a higher degree of harmonisation.

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?

Please see above.

We do not think that other element should be included in an agreement between feeder and master UCITS.

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

AFG wishes to stress the need for the law applicable to the agreement between the depositaries to be identical to the law applicable to the agreement between the master UCITS and the feeder UCITS, i.e. the law of the Member State where the master is established.

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?

AFG calls for a high degree of harmonisation and therefore believes that the treatment of all unitholders, should they be invested in the feeder or directly in the master, should be equal. In this light, we cannot understand how the measures to protect the interests of other unitholders in a master UCITS could be left to national laws and regulations.

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?

Yes.

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?

We estimate that the application of internal conduct of business rules will be less costly than the implementation of an agreement between feeder and master UCITS.

Chapter 2 - Measures to avoid market timing

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

Yes.

Chapter 3 - Liquidation, merger or division of a master UCITS

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

We globally agree with CESR's analysis. However, we would like to highlight the need to provide investors in the feeder with information on the liquidation of the master in the same delay as they would receive information on a change in the master's investment policy. Investors in the feeder should be informed that the master is being liquidated and that the feeder is considering different options.

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?

AFG comments on box 5

We would like to ascertain that the obligations relating to ratios are void during the transition period and that it is possible to invest in money market funds. We would therefore appreciate more clarification on what "efficient cash management" is.

We appreciate that the feeder cannot prohibit the liquidation of the master UCITS.

Question 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?

Yes, if the law applicable to the contract is the law of the Member State where the master is established. If not, more time would be necessary to prepare a proposal for an option other than liquidation of the feeder and a three-month period more appropriate.

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

One month seems an appropriate length of time.

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

Suspending subscriptions during a period in which the feeder UCITS is unable to make new investments seems impractical in certain situations. We therefore suggest re-wording as follows:

"It should be possible to suspend subscriptions during the period in which the feeder UCITS is unable to make new investments".

In case subscriptions are not suspended, we highlight the need to make potential investors aware that the feeder is temporarily unable to make new investments.

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:

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

We believe that the suspension of subscriptions should be considered in relation to the future plans of the feeder UCITS. Indeed, the feeder might not want to suspend subscriptions during the period in which it is unable to make new investments if it anticipates to feed into a new master or become a non-feeder fund.

Chapter 4 - Agreement between depositaries

AFG comments on box 7

In the same way we support the application of the law of the Member State where the master UCITS is established to the agreement between the master and the feeder, the AFG supports the application of the law of the Member State where the master UCITS is established to the agreement between the depositaries of the master and the feeder. Indeed, this would avoid a risk of fragmentation and ensure a fair treatment among investors. Moreover, this would be the least expensive option.

Chapter 5 - Reporting by the master UCITS depositary

AFG comments on box 8

2.a - AFG would prefer if the list of irregularities to be reported by the master UCITS depositary were exhaustive. We therefore suggest re-wording point (2) as follows: "The matters referred to in (1) shall include and are limited to".

We believe that the law of the Member State where the master UCITS is established should be applied in order to have a harmonised framework for the master-feeder structure.

2.b - We propose rewording as follows: "Errors in transactions and settlement for the sale or repurchase on units in the master undertaken by the feeder".

4 – We believe that, in order to ensure a fair treatment of all investors in the master, the master UCITS depositary should be required to also notify unitholders that are not feeder UCITS of any irregularities.

We therefore suggest rewording as follows: “Member States shall make provision in national law requiring the master UCITS or its management company to notify or otherwise inform those of its unitholders that are not feeder UCITS of any of the matters listed above”.

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

Please see above.

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?

No. As explained above, we believe that the master UCITS depositary should be required to also notify unitholders that are not feeder UCITS of any irregularities.

Chapter 6 - Agreements between auditors

AFG comments on box 9

We are of the opinion that the list of items shown in the agreement between auditors of the mater and the feeder should be exhaustive. We therefore suggest rewording as follows: “the agreement between the auditors of the master UCITS and the feeder UCITS referred to in Article 62(1) shall include and be limited to”.

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

In our opinion, only the law of the Member State where the master UCITS is established should apply to cross border agreements.

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?

AFG acknowledges the advantages of aligning the accounting periods of the feeder UCITS with that of their master. However, accounting processes are different among the Member States and we wish to keep the option to have accounting periods that are not aligned.

Chapter 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?

Yes. We believe that such change should be treated in the same way other changes are dealt with.

Chapter 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?

Yes. In particular, AFG proposes that the valuation rules of the master apply and that an auditor is involved in the process.

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Section III - Notifications

Chapter 1 - Scope of the information to be published by each Member State

AFG comments on box 10

Article 91.3 of the UCITS Directive reads:

"Member States shall ensure that complete information on the laws, regulations and administrative provisions which do not fall within the field governed by this Directive and which are specifically relevant to the arrangements made for *the* marketing of units of UCITS, established in another Member State within their territories, is easily accessible at distance and by electronic means."

AFG is of the opinion that Member States should disclose any other obligations in a concise and specific manner (for example through the reference of specific articles of law) so that the full list of applicable requirements is available on their website. In this context, we propose that a centralised system is managed by CESR (or the new authority).

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

Please see above.

We strongly disagree with point 9 (page 33): the list of information should be relied on as exhaustive.

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?

In our opinion, matters presented in the KID should not be treated any differently in marketing documents and Member States should not impose any additional or different requirements for marketing documents. The KID should suffice as a marketing document.

A level playing field with other financial products (for instance products that are subject to the Prospectus Directive) should be ensured.

Chapter 2 - Facilitating host 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?

Yes.

Chapter 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?

Yes.

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

No.

Chapter 4 - Electronic transmission of notification files

AFG comments on box 11

We generally agree with the requirements set in box 11.

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If you need any further information, please don't hesitate to contact myself at +33 1 44 94 94 29 (p.bollon@afg.asso.fr) or our Head of International Affairs Division, Stéphane Janin, at +33 1 44 94 94 04 (s.janin@afg.asso.fr) .

Sincerely Yours,

Pierre Bollon