COMMITTEE OF EUROPEAN SECURITIES REGULATORS

Date: 19 April 2010
Ref.: CESR/09-1226

FEEDBACK STATEMENT

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

Executive Summary

1. In this document CESR gives feedback on the responses received to the consultation on its technical advice on level 2 measures relating to mergers of UCITS, master-feeder UCITS structures and cross-border notification of UCITS (Ref. CESR/09-785).

2. In general, respondents were broadly supportive of the approach proposed by CESR. The number of substantive changes to the draft advice was therefore relatively small. More detail on the amendments is set out in the relevant section below.

Mergers of UCITS

3. CESR's advice on mergers of UCITS focused on the information to be provided to unitholders in the merging and receiving UCITS. In light of the broad support from the majority of respondents for its proposals in this area, CESR did not make significant changes in its final advice. CESR did however provide some clarification on the distinction to be made between information provided to unitholders in the merging UCITS and the receiving UCITS, as well as on the content of the information to be included with a view to allowing unitholders to make an informed decision. With regards to the manner of provision of the information, CESR confirmed its intention not to submit any specific advice in this area.

Master-feeder structures

4. CESR's advice in this area covered the content of the written agreements that should be put in place between the master and feeder UCITS, as well as their respective depositaries and auditors. CESR clarified certain elements of the content of these agreements, while reaffirming its view that there should at all times be equitable treatment of all unitholders. As regards the law applicable to the agreement, CESR agreed with the majority of respondents that in cross-border situations, the two parties should be free to choose whether to apply the law of the feeder or the master. CESR also set out detailed requirements on the steps to be taken in the case of a liquidation, merger or division of a master UCITS in order to satisfy the time constraints set out in the level 1 Directive. In this context, CESR considered an alternative proposal put forward by several respondents regarding liquidation of the master but ultimately took the view that this would have gone against the principle that the feeder should not have preferential treatment over other unitholders of the master UCITS and created a risk that unmanageable conflicts of interest may be generated.

Notification procedure

5. CESR took account of its existing level 3 guidelines on notification in preparing its advice, which covered the information that Member States should make available in relation to marketing in their jurisdiction of UCITS established in another Member State. Here, CESR recommended that Member States review their national requirements for the marketing of units of UCITS prior to implementation of the recast UCITS Directive in 2011. CESR also clarified certain elements of the standard notification letter and attestation. Finally, CESR took into account respondents' concerns about possible impediments to the UCITS' right to market its units freely in the host Member State and made corresponding adjustments to its advice.

INTRODUCTION

Background

1. In March 2007, the European Commission announced a series of targeted enhancements to the UCITS Directive (85/611/EC). Following further work and consultation, the Commission adopted a proposal for the revised UCITS Directive in July 2008, an amended version of which was approved by the European Parliament in January 2009 and adopted by the Council in June 2009. The final text of the revised Directive (2009/65/EC) was published in the Official Journal on 17 November 2009.

2. In the light of the approval of the aforementioned compromise text by the European Parliament in January 2009, the Commission prepared a provisional request to CESR for technical advice on possible implementing measures concerning the revised Directive ('the mandate'). The mandate was split into three parts as set out below.

   Part I – measures related to the management company passport

   This part included obligatory implementing measures which in some cases must be adopted by the European Commission by 1 July 2010. The following topics are covered: requirements on organisational arrangements, conflicts of interest and rules of conduct for management companies; risk management; additional measures to be taken by depositaries; and issues related to supervisory co-operation. CESR delivered its advice on this part on 28 October 2009 (Ref. CESR/09-963).

   Part II – measures related to key investor information

   This part covered implementing measures on the form and content of key investor information (KII) disclosures for UCITS. The request took account of the earlier request on KII sent to CESR in April 2007, in response to which CESR submitted a first set of advice in February 2008. CESR delivered its advice on this part on 28 October 2009 (Ref. CESR/09-949).

   Part III – measures related to fund mergers, master-feeder structures and the notification procedure

   The Commission is not under a legal obligation to adopt implementing measures in these areas. As such, the Commission encouraged CESR to focus in a first stage on the advice on Parts I and II above. Regarding Part III, the Commission invited CESR to reflect on the best way to organise its work in such a way that all necessary level 2 measures are adopted in time for them to be implemented by Member States within the timeframe imposed by the level 1 Directive.

Summary of CESR work and Impact Assessment approach

3. Following receipt of the mandate on 13 February 2009, CESR began work to develop its response on Part III in view of the deadline for submission to the Commission of 31 December 2009. A call for evidence was published on 17 February 2009 (Ref. CESR/09-179), to which CESR received 30 responses. Taking into account responses to the call for evidence and following intensive preparatory work within CESR, a consultation paper was published on 17 September 2009 (Ref. CESR/09-785) to which 21 responses were received. Responses to both the call for evidence and the consultation, which are available on CESR's website[1], were taken into account in the preparation of CESR's final advice (Ref. CESR/09-963), which was submitted to the Commission on 22 December 2009. A sub-group of CESR's Standing Committee on Investment Management,

[1] Call for evidence (Ref. CESR/09-179): http://www.cesr.eu/index.php?page=responses&id=132
Consultation (Ref. CESR/09-785): http://www.cesr.eu/index.php?page=responses&id=148

which is chaired by Mr Lamberto Cardia, Chairman of the Italian securities regulator, the Commissione Nazionale per le Società e la Borsa (CONSOB), was formed to develop proposals for CESR's advice. This sub-group was chaired by the UK FSA.

4. In the consultation paper, CESR invited respondents to estimate the possible costs incurred by CESR's proposals. In some cases respondents highlighted some possible additional costs but were generally not able to quantify them. CESR took respondents' qualitative views into account in reaching final decisions on the content of its advice.

Section I – MERGERS 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?

1. Several respondents fully agreed with CESR's recommendations that the information to be provided to unitholders should be written in a brief manner and in a non-technical language. In their view, the information to be provided to the unitholders should not be excessively detailed in order to avoid confusion and to increase the likelihood of investors' actually reading the information that is made available to them. According to them, information should be proportionate, short and clear. They had also the following comments on Box 1:

   - The information in paragraph 4(a) adds little to the requirement already contained in Article 43(3)(c) of the Directive.

   - They strongly disagreed with the proposal to provide information on the 'profile of the typical investor for whom the UCITS is designed' as requested by the paragraph 4(b).

   - Most of the information that is required in paragraphs 4 (b), (c) and (d) is already contained in the KID of the receiving UCITS that will be provided to the unitholders. Therefore, according to those respondents, it is highly questionable whether there is any use in repeating that information.

2. Two stakeholders felt that the requirements were too prescriptive and would overload investors with information.

3. A couple of respondents broadly agreed with the proposals but urged CESR to state that the information in Article 43(3)(d) was an exhaustive rather than an indicative set of information.

4. One respondent felt that paragraph 5(c) should set out clearly to what extent the costs of the merger are estimated and whether the figure is expressed as a maximum or on another basis.

CESR clarified the advice by distinguishing between two sets of information to be provided to each set of unitholders as appropriate. Paragraphs 3 to 8 of Box 1 apply only to unitholders of the merging UCITS, while paragraphs 9 to 13 apply only to unitholders of the receiving UCITS.

Concerning the information to be communicated to the unitholders of the merging UCITS, CESR clarified that if the KIDs of the UCITS show synthetic risk and reward indicators in different categories or identify material risks in the accompanying narrative, a statement drawing attention to those differences should be included. CESR also clarified that the information to be provided to the unitholders of the merging UCITS should not duplicate statements contained in the KID of the receiving UCITS except in the specific instances identified in Box 1. In addition, the requirement to mention the profile of the typical investors for whom the UCITS is designed has been deleted from the set of information to be provided to unitholders of the merging UCITS.

CESR clarified in the advice that the KID of the receiving UCITS shall be provided to unitholders of the receiving UCITS only in cases where that KID has been revised by the management company for the purpose of the merger.

Finally, CESR added the requirement that an explanation be given to the unitholders of the receiving and merging UCITS of why the merger is being proposed.

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

5. A majority of respondents agreed that the summary of key points should be optional.

Taking into account the views expressed by the majority of respondents, CESR confirmed its original approach i.e. that the summary of the key points should be optional.

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

6. Some respondents (6) were of the opinion that there should not be more detail at level 2 about what ought to be included in the description of the rights of unitholders. One asked for clarification on the 'relevant set of information' referred to in point 9 of Box 1 and also asked CESR to consider more carefully the different legal structures for UCITS among the Member States that did not require prior approval of mergers by unitholders.

7. One respondent suggested that some practical rules on the procedures for such mergers, in particular mergers between different fund types, could be added, while another respondent proposed to include a statement concerning the right to obtain additional information as specified by Article 43(3)(c) of the Directive.

CESR felt that, in light of the relatively few comments on this specific point, it was not necessary to modify the advice.

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

8. Eight respondents agreed with the proposed treatment of the KID of the receiving UCITS.

9. One respondent asked CESR to state explicitly that Article 43(3) can be construed as not requiring the KID of the receiving UCITS to be sent to the receiving UCITS' unitholders. Another respondent considered it would be helpful if CESR clarified whether or not unitholders of the receiving UCITS should be provided with the KID of the receiving UCITS.

CESR amended the advice so as to require that the KID of the receiving UCITS be sent to the unitholders of the receiving UCITS only in cases where that KID has been revised by the management company for the purpose of the merger.

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 the issue)?

10. Some stakeholders (5) felt that the proposals in Box 1 would lead to additional costs but recognised that it was difficult to provide an estimate of these costs.

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?

11. Respondents had mixed views concerning the necessity to provide advice on level 2 measures on how the information should be communicated to investors. While some respondents were in favour of harmonised rules on this subject, others felt it was not necessary.

12. One respondent noted that, given the complexities and differences between Member States, it seemed unlikely that a harmonised procedure could be achieved (even if maximum harmonisation was desirable).

13. One respondent felt that prescription at level 2 would be likely to achieve little but would support a recommendation for a post-implementation review of different practices relating to the provision of the documents to investors.

CESR notes that, in both the home State of the UCITS and each host State where it is marketed, the national law already makes provision for how documents and other information may be delivered to existing investors. Taking this into account, CESR confirmed the approach followed in the draft advice not to provide advice on level 2 measures in this area, while recommending that industry participants consider whether and how the provision of information to existing investors might be improved, so as to achieve more consistency in the effectiveness and timeliness of communications.

Section II – MASTER-FEEDER STRUCTURES

2.1 Agreement between feeder and master UCITS

Applicable law and fair treatment of unitholders

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

14. Seven respondents agreed with CESR's proposals. However, some thought the list of elements to be included in the agreement should be exhaustive to reduce legal uncertainty and ensure a higher degree of harmonisation, while another respondent suggested that master and feeder funds managed by the same management company should not be subject to the requirements.

15. Several respondents considered that the content of the agreement was too detailed; two felt that most of the information should be included in a service level agreement or operating memorandum with a focus on aspects governing the appropriate access to information, the change of standing arrangements and the applicable law.

In line with the general support from the stakeholders CESR did not modify the advice. However, CESR felt it appropriate to clarify that the advice covered only the areas which unitholders would reasonably expect to be explicitly addressed in the agreement, to the extent that they are not fully addressed by the feeder's fund rules/instruments of incorporation and its prospectus.

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?

16. Many respondents felt that all the points listed in Box 2 were appropriate, while one suggested including the concept of managing a master fund's dilution.

17. One respondent proposed including the elements in paragraphs 2, 3, 4 and 5 of Box 2 in a separate service level agreement. The same respondent believed that CESR's advice should have introduced the concept of 'materiality' in relation to the details of breaches by the master which will be made available to the feeder.

18. One stakeholder believed that the level of detail of the information contained in the agreement may in certain circumstances lead to a risk of inappropriate use of information by the feeder. As such, the respondent recommended that CESR include in the level 2 measures an overarching principle that the feeder must make appropriate use of the information provided by the master.

In light of the broad support from respondents on its proposals, CESR confirmed its approach in the final advice.

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

19. Concerning the law applicable to the cross-border agreement, all but two respondents that answered the question preferred option B. One respondent would have preferred a third option prescribing the law of the master, while the other supported option A.

As a clear majority of respondents expressed a preference for option B, this was reflected in the final advice.

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

20. Several respondents (6) agreed that measures to protect the interests of the unitholders in a master UCITS should be left to national law and regulation. However, one felt that fair treatment of all unitholders should already be a requirement under each jurisdiction's national law.

21. Two stakeholders disagreed with this proposal and favoured greater harmonisation.

CESR regards the fair treatment of all unitholders in a UCITS as a matter of great importance, as reflected in the principle in Box 3 of CESR's advice. CESR has not referred to 'equal treatment' since this could be understood as being inconsistent with legitimate differences between the rights of unitholders that are provided for in a UCITS' fund documents, such as share classes offering different rights of participation in the assets of the fund. However, if Member States consider it appropriate, they could supplement the requirements of Box 2 in line with the principle stated in Box 3. It is also open for the master and feeder to include a provision on this issue in their agreement if they so wish.

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?

22. Only a few respondents answered this question. One felt that, in general, the proposals were too complicated and could put at risk the efficiency benefits foreseen through the introduction of master-feeder structures.

23. Two respondents believed there would be some benefit in harmonisation of arrangements between master and feeder UCITS, to the extent that a standard template for an agreement might be developed. They acknowledged that there will inevitably be additional costs but did not provide any estimates

24. Two respondents did not see these proposals as a source of significant additional costs.

Internal conduct of business rules

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?

25. As regards the proposals on internal conduct of business rules, all the respondents that answered the question (11) agreed with the approach set out by CESR.

CESR saw merit in modifying the presentation of this part of the advice to make clear which elements of Box 2 were relevant for the purposes of the 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?

26. Respondents did not see the proposals as a source of additional costs.

2.2 Measures to avoid market timing

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

27. All the respondents that answered the question (11) agreed with the approach proposed by CESR.

28. However, two respondents, while agreeing on the principle of the approach to prevention of market timing, thought that operational details should be addressed in a service level agreement between the feeder and the master.

Taking into account the support expressed by a majority of respondents for CESR's proposals, CESR confirmed this approach in the final advice.

2.3 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?

29. Five respondents fully agreed with the CESR's analysis of the issues relating to liquidation, merger or division of a master UCITS.

30. One respondent agreed that CESR's analysis correctly identified the issues that need to be addressed but suggested an alternative proposal which is compatible with the time constraint (see feedback on question 17 below).

31. One stakeholder broadly agreed with CESR's proposal but felt that the feeder's investors should be provided with information on the liquidation of the master within the same period of time as they would receive information on a change in the master's investment policy.

32. One respondent strongly urged CESR to recommend to competent authorities to provide some specific regulation on the terms and timeframes within which competent authorities 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.

33. Finally, one stakeholder believed that the 3-month period was too short in case of liquidation of the master UCITS and would lead to feeders' being liquidated because they would not have enough time to consider other 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?

34. All the respondents that answered the question (8) said that in practice a feeder UCITS would become aware of the master's intention to liquidate, merge or sub-divide before receiving formal notice of the proposal except when the two UCITS are managed by companies that are not part of the same group.

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?

35. Four respondents disagreed with CESR's proposal, one of which proposed an alternative solution (which was supported by a number of respondents).

36. That alternative solution would consist of a disclosure by the master to the feeder accompanied by a confidentiality agreement (such an 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). The information would have to be given to the feeder UCITS as early as possible, in order to allow the feeder to plan an alternative solution.

37. 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.

38. 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.

- **Is two months long enough in which to prepare a proposal for an option other than liquidation of the feeder?**

39. Many stakeholders (6) felt that two months was long enough to prepare a proposal for an option other than liquidation of the feeder, while three respondents believed that this period was too short.

40. One of the respondents that agreed with the proposal suggested recommending a 2-month time frame for both liquidation and merger of master UCITS.

- **How quickly can the feeder make information for unitholders available once the competent authority's approval is received?**

41. One respondent felt that this would depend on the nature of the feeder and the underlying unitholders.

42. Three respondents felt it was impractical from an operational point of view to provide investors with information regarding the course of action within five working days (they favoured 10 working days). One respondent suggested reducing to 53 days the period of time in which the feeder must decide what proposal to submit to the competent authority, and extend to 10 working days the period of time during which to inform investors. One of the respondents suggested extending the period to 15 days.

43. Only two respondents felt that a period of one month was feasible.

- **Would you expect the feeder to suspend subscription during any period in which it is unable to make new investments?**

44. Only one of the five respondents that answered this question would expect the feeder to suspend subscription during any period in which it is unable to make new investments.

- **Does the proposed time extension in paragraph 10 strike a fair balance between the interests of investors and the practical needs of the feeder?**

45. All four respondents that answered this question agreed with CESR's proposal.

CESR considered carefully the alternative proposal for situations where the master UCITS is liquidated.

CESR members recognised that the proposal would solve many difficulties arising from the prospective timetable for the feeder to change its investment arrangements, reduce the uncertainty faced by investors in the feeder as to whether they should continue to hold units and probably make it more likely that feeders would be able to seek an alternative to being liquidated

However, CESR felt that the proposal went against the principle that the feeder should not have preferential treatment over other unitholders of the master UCITS and created a risk that unmanageable conflicts of interest may be generated (e.g. if the feeder disinvests substantially from the master before the announcement of a liquidation, at which point redemptions for other investors may be suspended).

Taking the above points into account, and the constraints already imposed by the level 1 Directive, CESR decided to retain its original approach.

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 going costs. What would be the benefits of the proposals, compared to no prescription at level 2 on this issue?

46. Of the six respondents that answered this question, five believed that CESR's proposals would make it difficult for a feeder UCITS to pursue an alternative option to liquidation.

Merger or sub-division of the master UCITS

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

47. One respondent disagreed with CESR's proposals and believed that advance notification of a merger to the feeder, under a confidentiality agreement, would allow for more equal treatment of the feeder's unitholders and the other unitholders of the master.

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

48. All but one of the respondents that answered the question agreed that one month was long enough to prepare for an option other than liquidation of the feeder.

- **How quickly can the feeder make information for the unitholders available once the competent authority's approval is received?**

49. All seven respondents that answered the question felt that 5 days was not sufficient to allow the unitholders to be informed and therefore suggested extending the period to 10 days (one suggested 15 days) and reduce the one month period to 23 days accordingly. One respondent thought that it should be feasible within one month.

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

50. Of the five respondents that answered this question, only one believed that the feeder should not suspend subscription during any period in which it is unable to make new investments.

- **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?**

51. The three respondents that answered this question agreed with CESR's proposal.

In light of the general support from stakeholders, CESR's made no change to its original proposals in the final advice.

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 going costs. What would be the benefits of the proposals, compared to no prescription at level 2 on this issue?

52. There were mixed views on this issue. Several respondents were of the opinion that CESR's proposals would make it difficult for a feeder UCITS to pursue an alternative option to liquidation because of the short space of time available, while others thought that the proposed procedure would not have a significant impact.

2.4 Agreements between depositaries

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

53. Respondents expressed a range of views on these proposals.

54. One respondent suggested that the more operational aspects of the relationships between the two parties should be covered under a service level agreement. Another respondent expressed a preference for a sufficiently principles-based and flexible approach regarding the content of the agreements, in order to allow for a range of different situations and countries. One stakeholder agreed with the proposal provided the national rules and mandatory duties of the respective depositaries were not affected.

55. Two respondents thought that level 2 provisions should be limited to the definition of a general framework and that any further details should be defined through level 3 measures.

56. One stakeholder did not believe that the feeder should have privileged access to information; rather, it should be made available to all investors. This could be achieved by making information publicly available on the website of the master's management company.

57. One respondent expressed disagreement with CESR's proposal on the basis that it required too much detail and the technical procedures for NAV calculation were not appropriate.

CESR agreed with the comment that the agreement between the depositaries should not impose duties on depositaries that are contrary to the relevant national rules. CESR clarified in Box 7 that '*A depositary, in complying with requirements made under Article 61(3) of the Directive, shall not be required to carry out any function that is forbidden or not provided for under the national law of its home State*'. CESR also deleted from Box 7 the list of operational matters the agreement should contain as it was felt more appropriate to give some examples in the explanatory text.

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

58. Respondents made a number of comments on Box 7:

- Regarding the NAV calculation (paragraph 3(a)), the specific responsibilities (if any) of the depositary vary according to the legal nature and the domicile of the fund. Taking this into account, respondents believed that this point should not be included at level 2 in the standard agreement to be signed between depositaries, or else that the paragraph should be amended to reflect the difference in regimes across Member States.

- Some respondents considered that the aspects developed in paragraph 3 (b) should be defined freely by the feeder fund or, where applicable, by the management company of the feeder fund, as for any other UCITS. They did not believe that the inclusion of this point in the agreement signed between depositaries would improve investor protection.

- Some respondents did not agree with paragraph 4 and the reference to the depositary's report to unitholders as this document is not a requirement in some Member States.

- Some respondents felt that the divergences between Member States on how to report and to monitor breaches needed to be taken into consideration. In addition, it must be clearly specified that the depositary of the feeder fund can only receive information transmitted voluntarily by the depositary of the master fund in accordance with rules imposed by national regulation of the master fund. In any case the depositary of the master fund should not be obliged to comply with rules which are not imposed by its own regulation.

CESR took into account some of the remarks received and amended the advice accordingly. CESR added a sentence to Box 7 stating that depositaries, in complying with requirements under Article 61(3) of the Directive, shall not be required to carry out any function that is forbidden or not provided for under the national law of its home state. In line with this, the references to the procedure for calculating the net asset value and the processing of instructions by the feeder to sell/buy units have been moved from Box 7 to the explanatory text (and are given as examples only). Taking into account other comments made by respondents, the requirement stating that the agreement should include the basis on which the feeder depositary may have access to records of breaches kept by the master depositary was deleted, together with the reference to the preparation of the depositary's report to unitholders.

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?

59. Concerning the law applicable to cross-border agreements, all but two of the respondents that answered the question preferred option B. One respondent would have preferred a third option prescribing the law of the master, while the second respondent supported option A.

As a clear majority of respondents expressed a preference for option B, this option was retained in the final advice.

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?

60. For two respondents, the introduction of an agreement between both depositaries would generate additional costs on a one-off and on-going basis. This was due to the need to define the agreement on a case-by-case basis given the lack of harmonisation on the rules imposed on depositaries across the EU and to the specificities of each master-feeder structure. These respondents felt that it was not realistic to envisage economies of scale resulting from the definition of a unique standard agreement. In addition, they took the view that depositaries would face difficulties resulting from the use of different languages across the Member States, leading to a need for translation in a number of cases (even if English is considered as the international standard to be used at the EU level). Legal aspects would also have to be considered for the establishment of such an agreement. For these reasons they believed that additional costs would arise from the implementation and the maintenance of the agreement. However, they acknowledged that the magnitude of the expected increase in costs was difficult to quantify at this stage.

61. Two respondents did not see the proposals as a source of significant costs, while one stakeholder believed that from the perspective of the UCITS or the management company, the only additional costs might be the higher fees charged by the depositary as a result of the additional obligations.

62. The benefits identified by respondents were standardisation, the establishment of equal requirements for all unitholders, UCITS and management companies in the EU and legal certainty.

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?

63. A majority of respondents (10) agreed with CESR's proposals in relation to the irregularities to be reported by the depositary. However, several respondents called for the concept of materiality to be introduced in order to reduce the scope of breaches to be reported by the depositary to those that have a material impact on the feeder.

64. Four respondents disagreed with CESR's proposals, one of whom felt this approach could give rise to different levels of investor protection across Member States.

65. For one respondent, breaches of the master's investment policy or strategy and breaches of investment and borrowing limits should be reported only to the auditor.

66. One stakeholder would have preferred CESR to develop an exhaustive list of irregularities to be reported by the master UCITS depositary and proposed the following drafting modifications:

- Paragraph 2 (b): 'Errors in transactions and settlement for the sale or repurchase on units in the master undertaken by the feeder'.
- Paragraph 4: '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'

67. Finally, one stakeholder believed that the term 'irregularities' should be more specifically defined in the respective agreements between the master UCITS and feeder UCITS and the depositaries.

CESR took note of respondents' comments in relation to materiality of irregularities to be reported by the depositary of the master UCITS and identified a possible need for further work in this area.

CESR also clarified that the irregularities set out in the advice should be seen as indicative examples only; they should not be seen as matters on which all depositaries should report, nor should depositaries feel obliged to limit the scope of their oversight to those matters.

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

68. All respondents but one agreed that the interests of the unitholders in a master UCITS would be adequately protected under national laws if these proposals were implemented.

69. One respondent believed that the master UCITS depositary should be required to also notify unitholders that are not feeder UCITS of any irregularities.

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?

70. In line with responses to previous questions, respondents did not provide any estimates of possible additional costs. Some respondents predicted that the proposals would lead to additional costs whereas others were not expecting a cost increase.

2.6 Agreements between auditors

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

71. Respondents broadly agreed with CESR's proposals. However, some believed the list of items in the agreement should be exhaustive and that the concept of materiality should be introduced.

72. One respondent believed that further clarity was required in relation to the 'ad hoc report' and the scope of this report in point 3 of the Box. Regarding point 4 ('irregularities in the audit report'), the same stakeholder understood this as referring to anything other than an unqualified opinion and therefore suggested a non-exhaustive list of potential 'irregularities' be established at level 3.

In light of the general support for CESR's proposals, no changes were made to the advice published for consultation.

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

73. All but one of the respondents who answered this question preferred option B. One respondent would have preferred the option of the law of the master.

Due to the support of the majority of respondents for option B, this option was retained by CESR in the final advice.

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?

74. Several respondents acknowledged the advantages of aligning accounting periods but preferred to retain the option of not doing so, while some respondents foresaw that feeder UCITS would generally align their accounting periods for practical reasons.

75. Other respondents sought confirmation that the feeder UCITS could re-use the master UCITS' statement of accounts in its own reporting obligations, while one asked CESR to clarify whether the feeder UCITS has to represent in its accounting documents what is held in the portfolio of the master UCITS.

As the responses to these questions did not relate to the content of the draft advice as such, CESR made no changes to its original proposals.

Question 31: What would be the additional costs of the proposals in Box 9? Please quantify your estimate of one-off ongoing costs. What would be the benefits of these proposals, compared to no prescription at level 2 on this issue?

76. Although some respondents envisaged an increase in auditing costs due to the need to prepare an ad-hoc report, they were not able to provide estimates.

2.7 Change of feeder UCITS objective

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

77. All but one of the respondents that answered this question (11) agreed that it was not necessary for CESR to provide advice on level 2 measures on this issue.

Taking into account the support among respondents for its proposed approach, CESR did not provide any advice on this point.

2.8 Transfer of assets in kind

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

78. A large majority of the respondents that answered this question agreed that it was not necessary for CESR to provide advice on level 2 measures on this issue.

Taking into account the support among respondents for its proposed approach, CESR did not provide any advice on this point.

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?

79. Two respondents fully agreed with CESR's proposals.

80. Two stakeholders agreed with CESR's proposals in relation to publication of marketing information but stressed that, in their view, management companies should be able to rely entirely on the information published by Member States and should not be held liable if they failed to comply with a requirement that was not published. The latter point was supported by two other respondents, who felt that to have anything other than an exhaustive list would place the UCITS in an unfair position.

81. One respondent made the following additional points on Box 10:

- There should be a requirement for the information to be kept up-to-date and the date of the last update to be on the website.

- Box 10, para 2 – insert 'and published in a language customary in international finance'.

- Box 10 para 3(d) or (e) – insert 'and details of where any marketing material requires pre-approval by the authorities'.

82. Two stakeholders took the view that the best solution was to provide a narrative description on the applicable laws, regulations and other provisions that relate specifically to the marketing of UCITS together with a series of references or links to source documents.

83. Two respondents were not comfortable with the use of links because the information could be hidden and not 'easily accessible at distance and by electronic means'. Moreover, they shared the view that it should be made clear that management companies were able to rely on the information published by Member States and could not be held liable if they failed to comply with a requirement that was not published. One respondent also suggested deletion of the second sentence of paragraph 7 in the Explanatory Text.

84. One respondent, while agreeing with CESR's proposal, suggested the following points for insertion in point 3(g):

- Requirement for a local transfer and paying agent, including information on which institutions qualify for such function.

- Whether – despite the existence of a local transfer- and paying agent – settlement through other channels with a securities deposit to be maintained in the name of the client in the host Member State is recognised.

- Whether – despite the existence of a local transfer- and paying agent – settlement through other channels with a securities deposit to be maintained in the name of the client in a third country (which may be the home State of the UCITS) is recognised.

85. Finally, one contributor would expect that in order to make the information easily accessible and in a clear and unambiguous manner, the information should be available in one place and in one document and not, as suggested in Box 10 point 2, via a series of links or source documents. Furthermore, the respondent would prefer that such information, to the extent possible, be presented in a homogeneous format by the competent authorities. The same respondent favoured prescription on the language in which the information should be provided.

CESR took note of the suggestions by some respondents that firms should be able to rely on the published information and should not be held liable if they fail to comply with a requirement that was not published by the authority. CESR notes that this is a question of legal interpretation. If it is considered that the text of the Directive does not confer such an indemnity from liability, then level 2 measures cannot provide one instead. CESR's understanding is that such a list of information cannot be relied on as exhaustive and must be without prejudice to other provisions in the national law of the host State.

Some respondents had concerns about the relevance of the information published by competent authorities. In light of this, CESR included in its advice a recommendation that Member States make a commitment to review their national requirements for the marketing of units of UCITS prior to implementation of the recast UCITS Directive in 2011. The purpose of the review would be to ensure that all requirements (e.g. the type and quantity of information requested) are appropriate and proportionate for the purpose for which they are imposed.

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?

86. Four respondents were of the opinion that the main benefits of this proposal would be the reduction of legal costs or the reduction in time allocated to researching the appropriate marketing rules. Respondents did not give any indications of possible additional costs.

3.2 Facilitating host State access to notification documentation

Question 36: Do you support the development of a centralized 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?

87. The proposal of the development of a centralized IT system to facilitate the notification procedure and provide a central repository for fund documents was welcomed by most respondents. Only one respondent rejected this proposal.

88. However, respondents were not able to give an opinion on the feasibility of adapting the OAM for this purpose.

As set out in its advice, CESR will carry out further work to assess the pros and cons of the different types of IT system that could be developed with a view to introducing greater automation to the process of facilitating host state access to notification documentation.

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 centralized system? Please quantify your estimate of one-off and ongoing costs.

89. Most respondents were not able to provide information on the current costs of the notification process. One respondent answered that average costs of notification are 3,000 euros but can be higher (10,000 euros in Italy for example).

90. Concerning the additional costs to stakeholders of developing a centralised system, some respondents noted the importance of carefully evaluating the costs and additional benefits of an alternative solution. Although respondents were not able to provide estimates of additional

costs, one believed the costs should be borne only by the competent authorities, as UCITS and investors did not have a direct benefit that would justify the costs of implementation.

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

91. The respondent that was resistant to the development of a centralised system felt that the benefits would be minor compared to the potential costs.

92. Two respondents believed that a centralised system would provide greater certainty, standardisation of processes and reduction of both costs and the length of time required for the notification process.

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?

93. Four respondents fully agreed with the proposed notification letter while one felt that Part B (non-harmonised part) should be removed. The same respondent also suggested that the section 'Arrangements for the provision of facilities to unitholders in accordance with Article 92' of the notification letter should clearly state 'if required'.

94. Two respondents noted that there was no mention of share classes in Part B; also, as it was not always possible to define an ISIN code at sub-fund level, they sought confirmation that this field was not mandatory.

95. Five respondents disagreed with the requirement of identification of distribution channels. These respondents also felt that the notification process should not be halted if non-harmonised documents required by host Member States were not provided.

96. One respondent asked for confirmation of whether electronic signatures or PDF format copies of the notification letter would be acceptable, while another stakeholder was of the opinion that Part B would be more useful if it were customized by each Member State to include all of the national requirements for marketing UCITS in a particular jurisdiction.

In response to the point raised by one respondent, CESR added in the table in Part A a column for the identification of the share classes to be marketed in the host State. CESR agreed with the remark concerning electronic signatures and amended the notification letter to clarify that electronic signatures would be acceptable where home State national laws permit them. CESR noted respondents' views regarding the requirement to identify the distribution channels in part B of the notification letter but felt this was important for the purposes of the supervisory duties of the host competent authority.

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

97. Only two comments were made on the proposed attestation letter:

- Two respondents believed that the attestation letter should contain the actual wording required by Article 93(3) e.g. that the UCITS 'fulfils the conditions imposed by' the Directive.

- One respondent requested clarification of the meaning of 'Serial number', adding that if this was to be understood as the ISIN code, this should be explicitly stated.

CESR agreed with the comments regarding Article 93(3) and added the text 'fulfils the conditions imposed by the Directive'.

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?

98. Two respondents believed that once the processes had been embedded, the use of the proposed letters would probably reduce costs rather than generate any additional costs.

3.4 Electronic transmission of notification files

Questions 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?

99. Seven respondents supported the development of a dedicated electronic system to effect transmission of notifications between competent authorities.

100. One stakeholder agreed in principle but, given the potential time and costs associated with the development of such a system, felt that email communication should be sufficient. Two respondents were opposed to the development of a dedicated system.

As set out in its advice, CESR will carry out further work to assess the pros and cons of the different types of IT system that could be developed with a view to introducing greater automation to the notification process.

Questions 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?

101. The procedure for use of email to transmit notifications was overwhelmingly welcomed by respondents, with the exception of paragraph 7 of Box 11 (as explained below under Q44). However, one respondent called for CESR to issue level 3 guidelines on the use of e-mail.

In light of the support among respondents for CESR's proposals on the use of e-mail, these were confirmed in the final advice.

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?

102. Although there was broad agreement among respondents for the majority of CESR's proposals, many stakeholders opposed the proposals in paragraph 7 of Box 11 as they felt they would penalise UCITS for an error or omission that was beyond its control. These respondents suggested 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.

103. Two respondents believed the advice should go further and require the host State regulator to actively confirm that a notification is complete rather than merely notifying the home State regulator where there are problems, and that the home State regulator should be required to send a copy of this confirmation to the UCITS in order to provide them with sufficient certainty that they can commence marketing without risk of complications.

104. One respondent was also concerned by the comment in section 38 of the explanatory text that the host State authority is 'not under any obligation' to review the documents in detail or check that the UCITS complies with local marketing requirements. The respondent felt this could result in a lack of certainty for UCITS if the checks could be carried out at the discretion of the host state.

105. No specific comments were made on the issue of adequacy of investor protection.

In light of the concerns raised by respondents on paragraph 7 of Box 11, CESR amended the advice so as to increase from 24 hours to 3 working days the time period during which any problems in the notification can be resolved, and after which a home State authority must instruct the UCITS to cease accessing the market in that State. CESR also clarified that in case of an incomplete notification by a home State authority, that authority shall make all reasonable efforts to resubmit a complete notification at the earliest possible opportunity. Regarding the requests by some respondents to require active confirmation of receipt by the host State authority, CESR took the view that this would be inconsistent with the level 1 Directive. However, CESR did add in the advice that in cases where the home State authority does not receive an acknowledgement from the host State authority within the specified period, it shall follow up the matter by contacting the host State authority immediately.

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

106. Of the few respondents who answered this question, most thought level 2 measures would be more appropriate to ensure standardisation. Only one felt that these provisions would sit more appropriately at level 3.

Taking respondents' views into account, CESR retained its general approach of recommending adoption of measures at level 2.

Annex 1 – List of respondents

	Name of respondent	Activity
1.	ABI – Italian Banking Association	Banking
2.	BNP Paribas Securities Services	Banking
3.	Division Bank and Insurance	Banking
4.	European Banking Federation	Banking
5.	National Association of German Cooperative Banks/ BVR	Banking
6.	State Street Corporation	Banking
7.	AFG	Insurance, pension & asset management
8.	Assogestioni	Insurance, pension & asset management
9.	BEAMA	Insurance, pension & asset management
10.	BlackRock	Insurance, pension & asset management
11.	BVI Bundesverband Investment und Asset Management e.V.	Insurance, pension & asset management
12.	EFAMA	Insurance, pension & asset management
13.	Fidelity International	Insurance, pension & asset management
14.	Swedish Investment Fund Association	Insurance, pension & asset management
15.	Verband der Auslandsbanken in Deutschland e.V.	Insurance, pension & asset management
16.	ALFI	Investment services
17.	AFTI	Others