



17 November 2009

Carlo Comporti
The Committee of European Securities Regulators
11-13 Avenue de Friedland
75008 Paris
France

Dear Mr Comporti,

RE: 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

The Depository and Trustee Association (DATA) represents all depositaries and trustees of UK-based authorised unit trusts and open-ended investment companies. At the end of September 2009, the members of DATA were responsible for safeguarding £463.4 billion of funds under management.

We welcome the opportunity to comment on this consultation and our response is attached. We urge CESR to consider what information is necessary and proportionate in both disclosing to investors and the contents of agreements between the parties to the UCITS.

If you would like to discuss any of our comments in more detail, please do not hesitate to contact me.

Yours sincerely

Kevin Tomlin
DATA Chairman

65 KINGSWAY LONDON WC2B 6TD TEL: +44 (0)20 7831 5873
WEBSITE: www.datasoc.co.uk
Company limited by guarantee. Registered in England and Wales No. 3822966.

SECTION I – MERGERS OF UCITS

1. Do you agree with CESR's proposals for specifying the information to be given to unitholders?

We believe that the proposals are too detailed and could overload investors with information, causing confusion and resulting in the key information being 'lost'. Furthermore, as mentioned by IMA, some of the information required in the proposals are already required in the other documentation (such as the KID).

Is there any other information that is essential for them?

We believe that it would be beneficial to:

1. state why the merger is being proposed, highlighting potential benefits to the unitholders;
2. provide comfort that where the merging UCITS is, for example, French domiciled and the receiving UCITS is German and currently not registered in France, that merging unitholders will receive all information in French.

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

Assuming that the reason for the merger and its benefits are clearly stated at the beginning (as mentioned above), we do not believe that a summary of the key points is required in any event. In fact, such a summary could lead to confusion and duplication.

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

We do not believe that any more detail is necessary. However, we seek clarification that the 'relevant set of information' (Box 1.9) is simply information that is already provided to existing investors.

With regards to Box 1.6 (a), whilst we understand that the national law on mergers may differ amongst Member States and derogation is therefore the most suitable solution, we are concerned that some Member States may not have any national law on the unitholder approval of mergers, particularly given the variety of UCITS legal structures that are subject to different legal regimes e.g. corporate, trust. We ask CESR to consider this more carefully.

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

No comment.

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)?

No comment.

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?

We agree with this approach.

SECTION II – MASTER-FEEDER STRUCTURES

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

We feel that too much detail is required here. As we have stated in our previous response, much of the detail is subject to commercial decisions and, therefore, would be included in a service-level agreement. For example, in our view, only points 1 and 6 could be included in the master-feeder agreement with the remaining issues being covered in a separate contract between the parties, which does not need to be filed with the regulator. We note that CESR have not provided detail where the master-feeder arrangement is conducted by the same Management Company and therefore subject to internal conduct of business rules.

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?

Where relevant, the concept of managing master fund dilution, resulting from the dealing costs arising from large inflows and outflows from the feeder, should be covered - the process for advising the feeder ought to be an essential term within the agreement so that appropriate decisions can be made at the feeder level.

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

We believe that option B better protects the interests of the relevant investors.

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?

Yes, provided that, as stated under paragraph 15, fair treatment of all unitholders is already a requirement under each jurisdiction's national law.

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?

No comment.

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?

The conflicts of interest recognised in Box 4.2, *should* be included, not *may be* included (ie, not optional).

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?

No comment.

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

We agree with this approach.

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

We agree with the analysis.

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?

Yes. However, we see no problem with that as a feeder should have no more favourable treatment than any other investor.

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?

We agree.

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

No comment.

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

Yes.

(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?

Yes.

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

No comment.

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?

We agree.

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

No comment.

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

Yes.

(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?

Yes. In addition, depositaries could be involved in various aspects such as the sub-divisions of a master. Does the master/feeder agreement need to cover the depositaries involvement in these, e.g. by setting out that the depositary should be kept informed?

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?

No comment.

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

Yes. Given that there are considerable differences between the mandatory duties of a depositary in each Member State and the extent to which a depositary can delegate it would be difficult to be too prescriptive. The fact that Article 61(1) makes it clear that both depositaries may disclose information to each other without incurring any legal liability for breach of confidentiality should provide comfort to the depositaries and enable them to provide such information as is reasonably requested to assist the other with the fulfilment of its regulatory requirements. Nevertheless, we do not believe that the feeder should have privileged access to information and it should be made available to all investors. This could be achieved by making information publicly available on the management company of the master's website.

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

Yes, but such information should only be required where it is a mandatory duty under national law. This caveat should apply to all of the information, not just paragraph 3.

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

We believe that option B is the most appropriate.

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?

Provided a depositary only has to comply with local requirements there should not be significant costs. However, if CESR insists on a master depositary having more reporting obligations, then increased costs are anticipated, although this would be difficult to quantify as master/feeder models could vary in terms of the number of parties involved and, therefore, the complexity of different requirements.

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

Yes, we agree that a depositary can be expected to report only on what it is required to oversee in accordance with its national law and regulation, but that does not prevent depositaries from choosing to extend that scope under the terms of the depositaries' agreement. The depositaries should also agree the list of 'types of irregularities'.

Any material irregularities should firstly be reported to the master UCITS and its management company. They should be reported under Article 61.2 to all relevant parties investing in the

master, only if the management company has failed to address them properly within a reasonable time. Costs could be significant if reporting irregularities to all parties.

We do not believe that the master depository should report how irregularities have been resolved as that is the role of the manager of the master UCITS. Similarly, it is not appropriate for a master depository to approve the resolution or determine an acceptable resolution (although it is noted that, in both cases, a depository will be involved in the process).

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?

Yes, although in relation to 8.4, we believe it is essential that all unitholders should be treated equally and, therefore, Member States *should* (not *may*) make provision in national law to provide all appropriate information to non-feeders that would be provided to feeders.

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?

Provided a depository only has to comply with local requirements there should not be significant costs. However, if CESR insists on a master depository having more reporting obligations, then increased costs are anticipated, although this would be difficult to quantify as master/feeder models could vary in terms of the number of parties involved and, therefore, the complexity of different requirements.

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

No comment.

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

Where there is an agreement in accordance with Article 60(1) we agree that the applicable law of that agreement shall also be the applicable law of the auditors' agreement. If no such agreement is in place we believe that the auditors should choose either the applicable law of the Member State in which the master or feeder fund is established i.e. Option B.

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?

No comment.

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?

No comment.

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

Yes. We do not believe that the situation envisaged here is any different to that of any UCITS proposing a change to its investment objectives and policy provided that national law and regulations already prescribe the requirements.

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

Yes, we agree that it would be difficult to prescribe a harmonised procedure provided that national regimes impose differing requirements.

SECTION III – NOTIFICATIONS

We have no comments to make on this section.