

10 September 2009

CESR
11-13 Avenue de Friedland
75008 Paris
France

Dear Sir

Technical advice on level 2 measures related to the UCITS management company passport

The IMA represents the asset management industry operating in the UK. Our members include independent fund managers, the investment arms of retail banks, life insurers and investment banks, and the managers of occupational pension schemes. They are responsible for the management of over £3 trillion of assets, which are invested on behalf of clients globally. These include authorised investment funds, institutional funds (e.g. pensions and life funds), private client accounts and a wide range of pooled investment vehicles.

Overall, we think that the general approach taken by CESR with regard to the level 2 measures for UCITS management companies, in aligning the requirements with MiFID, is the right one. However we do have a number of specific issues with the Sections I to IV of the proposals, as set out in the attached paper.

We should draw your attention to the following points in particular, which could prove costly for our members:

- The proposals about exercise of voting rights in Box 11 of Section I. This is akin to mandatory voting – an approach which the UK fund management industry does not support. We were pleased to hear CESR's confirmation at the open hearing in Paris on 1 September that CESR's intention is not to introduce mandatory voting. We would be grateful if CESR could clarify this in the final advice to the Commission. See our response to question 17.
- The suggestion in Section III that the requirement for an agreement between the depositary and the management company be extended to situations where both parties are in the same Member State. We do not support this. The rationale for including the depositary obligations in the management company passport arrangements is that, as the entities are governed by the rules of different Member States, it is important to ensure a common understanding as between those different Member States. This is not the case where both entities are in the same Member State. See our response to question 2 in Section 3.

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- The suggestion that requirements on remuneration be extended to all employees. This would prove costly and unnecessary and goes beyond what is required under CRD.

Please do not hesitate to contact us should you need any further information

Yours faithfully

Alwine Jones
Adviser, Regulation

Section I : Organisational requirements and conflicts of interest

Chapter 1 - Organisational requirements

1. Do you agree with the general approach proposed by CESR?

We agree with the general approach of aligning the requirements with the relevant MiFID requirements – although there are a number of areas where we have specific concerns – see below.

2. In your view, does aligning the organisational requirements for UCITS management companies with the relevant MiFID requirements in the areas of

- *general organisational requirements;*
- *compliance;*
- *internal audit;*
- *responsibility of senior management;*
- *complaints handling;*
- *personal transactions; and*
- *electronic data processing and record keeping*

impose additional costs on UCITS management companies? If so, please specify which areas are affected. If possible, please provide quantitative cost estimates of the additional costs for UCITS management companies.

Overall such an approach should not result in significant costs for UK management companies, since FSA rules already impose equivalent requirements to those in MiFID. However, there are specific areas where the proposals do go beyond MiFID and could be costly – see below.

3. In your view, what are the benefits of aligning the organisational requirements for UCITS management companies with the relevant MiFID requirements?

See 2 above.

Box 1

4. Do you agree with CESR's proposals on organisational procedures and arrangements for management companies? If not, please suggest alternatives.

This chapter seems to be identical to MiFID L2, apart from the following addition:

“to establish, implement and maintain..... effective information flows with any third party involved, including the depository, distributors and any other third

party which performs activities on behalf of the management company, in such a way that those parties receive all information deemed to be necessary to perform their duties adequately;"

The application to the depositary seems sensible. We have however some concerns in respect of the application to distributors and also what is meant by "any other third party which performs activities on behalf of the management company." This should not be used as a way of imposing burdensome and detailed information requirements on the management company regarding all the different stakeholders it is dealing with.

Box 2

5. Do you agree with the above CESR proposal on the responsibility of senior management of management companies? If not, please suggest alternatives.

No comments.

Box 3

6. Do you agree with the above CESR proposal on the remuneration policy of management companies? If not, please suggest alternatives.

The recent revisions to CRD set out the framework for remuneration policies for investment managers. But there are a number of anomalies between CRD and these proposals:

- Box 3 states that the policy should be reviewed regularly and made available to the UCITS managed; CRD states it should be reviewed annually;
- The following references made in the explanatory text seem to be unique to UCITS L2, "In order to be in line with the protection of the interests of clients and investors, factors other than financial performance should be considered, such as compliance with systems and controls of the management company."
- The involvement of compliance and internal audit, as detailed in the explanatory notes, is greater than CRD envisages; "The compliance function and, if applicable, the internal audit, should be involved in the design and review of the implementation of the remuneration policy and report to the supervisory function on material weaknesses and shortfalls. "
- The scope here is "senior management," whereas CRD applies to "professional staff who have a material impact on the risk profile of the investment firm."

CRD states that the size, complexity etc of the firm needs to be taken into account in framing L2 proposals. In our view, there is no need for prescriptive requirements for UCITS managers with regard to remuneration since the same risks and conflicts do not apply as apply in other financial services areas. Therefore, we would argue that in the case of UCITS managers, the requirement to have a remuneration policy which

is consistent with effective risk management – as set out in paragraph 1 of Box 1 – is sufficient.

7. In your view, should the requirements set out above in relation to senior management be extended to cover all employees of UCITS management companies?

We do not agree that the requirements should be extended across the board. This goes further than the CRD requirements – which apply to professional staff who have a material impact on the risk profile of the investment firm.

Box 4

8. Do you agree with the above CESR proposal on the compliance function of management companies? If not, please suggest alternatives.

No comments.

Box 5

9. Do you agree with the above CESR proposal on the internal audit of management companies? If not, please suggest alternatives.

No comments.

Box 6

10. Do you agree with the CESR's proposal on complaints handling procedures for management companies? If not, please suggest alternatives.

The proposal that an investor should be able to file a complaint free of charge and in an official language of his Member State is not found in MiFID. Paragraph 44 of the advice suggests that the provision could be drafted consistently with Article 10 of the MiFID level 2 directive.

Suggested action: Art 10 MiFID L2 should be used for complaint handling instead of the proposed CESR text here.

Box 7

11. Do you agree with CESR's proposals on personal transactions? If not, please suggest alternatives.

In relation to the meaning of personal transaction, at (b)(ii) the term "person with whom he has a family relationship" needs defining. This is defined in MiFID in Article 2 of the implementing directive but has not been picked up the definitions at the beginning of this section by CESR.

In the section on personal transactions, reference in clause 1(b) to the MiFID implementing directive is correct and "or would otherwise constitute a misuse of information relating to pending orders" does need to be in the clause in order to make proper reference in this directive to the concept that is covered by Article 47(3) of the MiFID implementing directive.

Suggested action: include the definition from MiFID L2 of "person with whom he has a family relationship."

Box 8

12. Do you agree with CESR's proposals on electronic data processing and recordkeeping requirements? If not, please suggest alternatives.

Under the heading 'Recording of subscription and redemption orders' we wish to have clarity as to which orders need to be recorded as the provisions refer to the fact that the orders are "received from investors", but it is unclear how this deals with intermediated orders. We understand that by "investor" CESR are referring to the person (or entity) in whose name the investment is or will be registered, rather than any underlying beneficial owner. We ask for this to be confirmed and the ambiguity to be eliminated.

On a point of terminology - the term "NAV" is generally used in European parlance when referring to price per unit/share, whereas here it tends more to be understood as talking about the value of the fund as a whole. However, the expression "liquidated/subscribed NAV" is itself a very strange one in the context in which CESR uses it. In terms of units, price, consideration etc, (iii) and (iv) together refer to:

- Total consideration
- Liquidated/subscribed NAV
- Subscribed/redeemed units/shares

Whatever the interpretation is of some of these terms, there appears to be one missing - we would be looking for the following:

- Subscribed/redeemed units/shares
- Subscription/redemption price
- Subscription/redemption value (units/shares x price)
- Total consideration (gross amount including charges for subscriptions, net amount after charges for redemptions)

Box 9

13. Do you agree with CESR's proposals on UCITS accounting principles? If not, please suggest alternatives.

Paragraph 1 seems to require full segregation only for investment compartments, but not for each UCITS.

Suggested alternative: A better last sentence, consistent with explanatory note 59, would be: "The accounting books of each UCITS and, if a UCITS has different investment compartments, each investment compartment should be fully segregated."

With regard to the explanatory notes:

60 ends by requiring that the accounting software should be able to provide automatically a balance sheet and profit and loss account. Quite what is meant by automatically is unclear – in the extreme it could mean no manual intervention. This is not practical. Some processes necessarily occur 'off system' for example, fair value price input, derivatives valuations (especially OTCs) and some of the more complex tax provisioning.

14. Does this proposal lead to additional costs for UCITS management companies? Please quantify your cost estimate. What are the benefits of this proposal?

See 13 above.

Box 10

15. Do you agree with CESR's proposals on investment strategies? If not, please suggest alternatives.

It is not clear what are the vires for this measure.

16. Does this proposal lead to additional costs for management companies? If possible, please quantify your estimate. What are the benefits of this proposal?

No comments.

Box 11

17. Do you agree on the proposed requirements relating to the exercise of voting rights? If not, please suggest alternatives.

It is not clear what are the vires for this measure; there is no basis in the Level 1 Directive to have rules on the use of voting rights, and in our view the text is too prescriptive. Managers have different approaches to the use of voting rights and transparency to the investors on the strategy used is the key issue. Particular concerns are:

- Para 1 requires that the management company to have strategies to ensure it exercises voting rights. In our view, this is akin to mandatory voting and something as an industry we do not support. First, it could result in mindless box ticking by those that would not otherwise vote but now feel compelled to do so. Secondly, in effect it would dilute the impact of those that vote and use their votes in a considered way.

- A management company may not necessarily know whether their votes have been exercised. In the UK under existing law, resolutions can be decided on a show of hands at the meeting with the result that unless a poll is called, an instruction to vote may not be exercised. In addition, the chain voting instructions go through – the beneficial owner, a fund manager, a custodian, the custodian's nominee, a registrar and possibly a proxy voting service - make it difficult for those initiating voting instructions to determine whether the instruction has been received let alone exercised.
- The clause also says that the votes must be exercised to the exclusive benefit of unit-holders. What does it mean by benefit and what is the benefit? As far as we are aware no one has ever really been able to demonstrate that a direct benefit accrues from the exercise of voting rights.

We were pleased to hear CESR's confirmation at the open hearing in Paris on 1 September that CESR's intention is not to introduce mandatory voting. We would be grateful if CESR could clarify this in the final advice to the Commission.

18. What are the additional costs of this proposal for management companies? If possible, please quantify your estimate. What are the benefits of this proposal?

CESR's proposal could lead to high cost impact on the management companies and thereby to the end investors.

Chapter 2 - Conflicts of interest

19. Do you agree with the proposed approach? Is there any additional adaptation you would suggest?

We agree with the general approach of aligning the requirements with the relevant MiFID requirements – although there are a number of areas where we have specific concerns – see below

20. In your view, does aligning the requirements for conflicts of interest for UCITS management companies with the relevant MiFID requirements impose additional costs on UCITS management companies?

- *procedures for conflict identification and management,*
- *independence of the persons managing conflicts,*
- *recordkeeping for collective portfolio management activities, and*
- *management of non-neutralised conflicts.*

If so, please specify which areas are affected.

If possible, please provide quantitative cost estimates of the additional costs for UCITS management companies.

Overall such an approach should not result in significant costs for UK management companies, since FSA rules already impose equivalent requirements to those in MiFID. However, there are specific areas where the proposals do go beyond MiFID and could be costly – see below.

21. In your view, what are the benefits of aligning the requirements for conflicts of interest for UCITS management companies with the relevant MiFID requirements?

Box 12

22. Do you agree with CESR's proposals on the criteria for identifying conflicts? If not, please suggest alternatives.

Clause 2 says when taking into account the situations possibly giving rise to conflict, that is to say possibly damaging the interests of the UCITS, the management company should consider the interests of the management company, the interests of the clients and the duty of the management company towards the UCITS. As we understand it, this clause does not change the duty that is in clause 1 which is found in MiFID, but it could be phrased better.

Suggested alternative: Clause 2 should read “When taking into account the situations possibly giving rise to a conflict, the management company should consider its duties towards the UCITS; the interests of any other of its clients, including any other managed UCITS; and its own interests, including those deriving from its belonging to a group or from the performance of services and activities.”

Clause 3 is a little easier to understand as it is basically applying clause 1 to the situation where there may be conflicts of interest with investors when the management company directly sells units of a UCITS.

There is a typo in clause 3, “sells” not “sales”.

Box 13

23. Do you agree with CESR's proposals on the identification and management of conflicts? If not, please suggest alternatives.

The text begins by following MiFID but in clause 2(a) we need to be clear why it is referring to “the interests of the UCITS or one or more other clients *or investors*”. Is this just taking into account the possibility that the management company may be involved in direct sales or is this suggesting that the conflicts of interest is much wider than those that may damage the interests of the UCITS? It should be the former.

Suggested alternative: Clause 2(a) should be re-drafted to be clearer. It would end “the interests of the UCITS or one or more other clients or investors in the case of direct sale.”

Box 14

24. Do you agree with the CESR's proposals on the independence of the persons managing conflicts? If not, please suggest alternatives.

Broadly this is acceptable, but we would suggest the following amendment in the interest of clarity.

Suggested alternative: Clause 2(a) might be re-drafted to be a little clearer. It would end “one or more clients or one or more investors in the case of direct sale.”

Box 15

25. Do you agree with CESR's proposals on records of activities giving rise to conflicts of interest? If not, please suggest alternatives.

No comment.

Box 16

26. Do you agree with CESR's proposals on management of non-neutralised conflicts? If not, please suggest alternatives.

The overall principle is acceptable, but the draft advice deals with the issues incorrectly. The damage to interests should be considered regarding the UCITS that is managed. Reference to the interests of "the relevant unit holders" is wrong; a management company cannot be expected to know their interests. The point is that it must act in the interests of the clients it has, including any managed UCITS. The reference to unit holders must be deleted.

In MiFID the disclosure needs to be made to the client before undertaking business. Here the senior management of the management company should be properly informed so that decisions are taken to ensure the management company acts in the best interests of the UCITS [and "relevant unit holders"]. This is acceptable.

There is also reporting obligation to "investors". Unlike disclosure in Article 22(4) of the MiFID implementing Directive, which must have sufficient detail, this disclosure must explain the decision taken by the management company. What is the form of the report? Given it has to be made to any unitholder or potential unitholder is it to be put in a KID or prospectus? Might the reports reveal commercially confidential material?

It is not clear what disclosure is necessary in this context. In our view it is sufficient, where there are no material non-neutralised conflicts, simply to report that fact to investors and state that the full conflicts policy is available on request.

The second clause of Box 16, which relates to direct sale, requires disclosure before selling the units. The nature of the disclosure is more akin to that expressed in MiFID but the proposal does not require the disclosure to be made in a durable medium. However this is not compatible with the Distance Marketing Directive (DMD), Article 5 of which requires certain information to be communicated to the customer 'on paper or in another durable medium'. This information includes information required under Article 4 of DMD, and Article 4.1 states:

"Where there are provisions in the Community legislation governing financial services which contain prior information requirements additional to those listed in Article 3(1), these requirements shall continue to apply".

So, given that paragraph 2 of Box 16 in the CESR proposal deals with prior information requirements, under DMD these would need to be given 'on paper or in another durable medium' - which is not specified in Box 16.

To summarise, Clause 1 needs working on, it is not yet fit for implementation. Reference to "relevant unit holders" should be deleted throughout. The reporting requirement needs work.

27. Are there any other issues you feel should be considered in addition to those already mentioned in this paper?

No comments.

Section II: Rules of Conduct for Management Companies

Boxes 1 and 2

1. Do you agree with CESR's proposals on the duty of management companies to act in the best interest of UCITS and their unitholders and on due diligence requirements? If not, please suggest alternatives.

Overall, yes, but we have the following comments on Box 1:

Clause 1 – “undue treatment” should be replaced by “undue preference” just for the sake of sense

Clause 3 – demonstrate to whom? We believe this duty should be owed to the regulator or to the depositary. Also, we feel that the last sentence in Clause 3 should be qualified to say that managers should be ‘able to demonstrate that they have used best endeavours to value the UCITS portfolio accurately.’

2. What are the additional costs of this proposal for management companies? If possible, please quantify your estimate. What are the benefits of this proposal?

Any comments?

Box 3

3. Do you agree with this general approach proposed by CESR for conduct of business rules relating to direct selling? If not, please suggest alternatives.

Our main concern here is whether the term ‘direct sale’ is sufficiently clear.

4. What are the additional costs of this proposal for management companies? If possible, please quantify your estimate. What are the benefits of this proposal?

Any comments?

Boxes 4, 5 and 6

5. Do you agree with CESR's proposals on conduct of business rules relating to direct selling? If not, please suggest alternatives.

The Points raised in Box 4 are trying to put onus on the management company to assess whether a retail investor should be buying a particular fund, as it isn't clear that this is in relation to advised sales only. There are exemptions to having to collate information on the client, the first being "the distribution of the concerned UCITS is provided at the initiative of the investor;" - does this mean execution only, or would direct marketing also be captured?

Clause 1(b) in Box 6 only applies to retail investors under MiFID; there appears to be

no reason why professional investors need to be included in this. See clause 3 for the detail then included. This should be applied in line with MiFID differentiating between retail and professional.

Also the requirements in Box 6 need to be brought into line with the requirements in the Distance Marketing Directive; in particular, Article 3.3, which states in the case of telephone sales, and subject to the explicit consent of the consumer, only the abbreviated distance marketing information needs to be provided during that communication. However, a firm must still provide the distance marketing information on a durable medium in good time before the consumer is bound by the contract, unless another exception applies.

6. What are the additional costs of this proposal for UCITS management companies? If possible, please quantify your estimate. What are the benefits of this proposal?

Any comments?

Box 7

7. Do you agree with CESR's proposals on direct execution of orders by management companies? If not, please suggest alternatives.

With reference to providing information on the policy to unit holders, we would question how much detail the management company should be giving to shareholders. On the one hand CESR is looking to increase disclosure and on the other require disclosure to be succinct, i.e. the two-page KID. It is unclear on the basis of CESR's draft advice who we should be demonstrating to that orders have been executed in accordance with the policy. It would be helpful if there were clarity as to who this should be: we would suggest it should be to the governing body of the UCITS, given that the regulator will in any event have the right of access to this information.

Clause 5 goes further than MiFID, suggesting that there should be an annual review of execution policy **AND** (not mentioned in MiFID) order execution arrangements.

The information provision methodology needs clarifying.

8. What are the additional costs of this proposal for UCITS management companies? If possible, please quantify your estimate. What are the benefits of this proposal?

Any comments?

Box 8

9. Do you agree with CESR's proposals on the placement of orders with or transmission to other entities for execution? If not, please suggest alternatives.

Again the information provision methodology needs clarifying:

Clause 3 – “make available ... to unit holders”; how?

Clause 5 – “demonstrate” – how and to whom? We believe this duty should be owed to the regulator or to the governing body of the UCITS.

10. What are the additional costs of this proposal for UCITS management companies? If possible, please quantify your estimate. What are the benefits of this proposal?

Any comments?

Boxes 9 and 10

11. Do you agree with CESR's proposals on the handling of orders? If not, please suggest alternatives.

No comments.

12. What are the additional costs of this proposal for UCITS management companies? If possible, please quantify your estimate. What are the benefits of this proposal?

No comments.

Box 11

13. Do you agree with CESR's proposals on inducements? If not, please suggest alternatives.

First, we note that there is no equivalent to Recital 39 of the MiFID L2 Directive here, and we believe that this should be included to ensure that payments of commissions such as renewal commissions can continue on the same basis as under MiFID. Recital 39 states:

For the purposes of the provisions of this Directive concerning inducements, the receipt by an investment firm of a commission in connection with investment advice or general recommendations, in circumstances where the advice or recommendations are not biased as a result of the receipt of commission, should be considered as designed to enhance the quality of the investment advice to the client.

Secondly, the drafting needs separating out as it conflates UCITS and investors in what we find is an ambiguous manner. Our suggestion is as follows:

Inducements

1. Management companies should not be regarded as acting honestly, fairly and professionally in accordance with the best interests of a relevant client in relation to a relevant service, they pay or are paid any fee or commission, or provide or are provided with any non-monetary benefit, other than the following:

- (a) a fee, commission or non-monetary benefit paid or provided to or by the relevant client or a person on its behalf;
- (b) a fee, commission or non-monetary benefit paid or provided to or by a third party or a person acting on behalf of a third party, where the following conditions are satisfied:
 - (i) the existence, nature and amount of the fee, commission or benefit, or, where the amount cannot be ascertained, the method of calculating that amount, should be clearly disclosed to

the relevant client, in a manner that is comprehensive, accurate and understandable, prior to the provision of the relevant collective portfolio management activity;

(ii) the payment of the fee or commission, or the provision of the non-monetary benefit should be designed to enhance the quality of the collective management portfolio activity and not impair compliance with the management company's duty to act in the best interests of the relevant client;

(c) proper fees which enable or are necessary for the provision of the collective portfolio management activity, such as custody costs, settlement and exchange fees, regulatory levies or legal fees, and which, by their nature, cannot give rise to conflicts with the management company's duties to act honestly, fairly and professionally in accordance with the best interests of the relevant client.

2. In relation to the provision of a collective portfolio management activity, a management company should be permitted, for the purposes of point (b)(i), to disclose the essential terms of the arrangements relating to the fee, commission or non-monetary benefit in summary form, provided that it undertakes to disclose further details at the request of a unitholder and provided that it honours that undertaking.

3. A relevant client may be a UCITS, in which case the relevant service is the provision of a collective portfolio management activity to the UCITS, or it may be an investor, in which case the relevant service is a direct sale to the investor.

14. What are the additional costs of this proposal for UCITS management companies? If possible, please quantify your estimate. What are the benefits of this proposal?

No comment.

Section III - Depositaries

Box 1

1. Do you agree that no additional requirements should be imposed on a depositary when the management company is situated in another Member State?

Yes.

2. What will be the costs of imposing such requirement for the industry? What would be the implementation difficulties for regulators?

The UCITS IV obligations regarding the depositary, including the need to put in place a written agreement regarding flow of information apply where a management company's home Member State is not that of the UCITS. CESR's remit is therefore to advise on requirements where a management company's home Member State and the UCITS home Member State differs.

The Commission specifically drew attention, in its provisional request to CESR for technical advice, that the scope of the measures is limited to those situations where the UCITS is managed on a cross-border basis and that they do not apply to situations where the three entities (UCITS, management company and depositary) are located in the same Member State.

Although not part of its remit, CESR suggests that similar requirements could be extended to instances where both the management company and the UCITS have the same home Member State.

We do not support this suggestion. The rationale for including the depositary obligations in the management company passport arrangements is that, as the entities are governed by the rules of different Member States, it is important to ensure a common understanding as between those different Member States. For that reason, the co-legislators considered that there was a need for additional safeguards. This is not the case where both entities are in the same Member State. Both entities will be aware of the requirements of that Member State and will have in place arrangements to enable the depositary to receive such information flow as it considers necessary.

We are not aware of any market failures which would justify regulatory intervention in this area. The costs that would arise if depositaries of all UCITS with management companies based in their home Member State had to put in place written agreements complying with the provisions envisaged for UCITS managed on a cross-border basis is likely to be high.

If this suggestion were to be pursued, market failure should be demonstrated and a rigorous cost/benefit analysis carried out.

Box 2

Penultimate paragraph of Box - "It shall also include a provision regarding the possibilities and procedures for the review of the depositary by the management company."

This sentence should be removed. Its inclusion suggests that there is an obligation on the management company to oversee the depositary. This is not an obligation arising from the UCITS Directive and could lead to confusion as to the responsibilities of each entity. Depositaries have duties of oversight of the management company, not vice versa.

3 . Are the proposed requirements appropriate?

IMA supports any approach that makes the management company passport provisions work smoothly and which enables agreements to be put in place swiftly. If it is felt that putting in place Level 2 provisions will achieve this, we support this approach.

The more definitive the list of matters to be covered, and in what detail, the better. Otherwise, there is risk that a considerable amount of time will be spent negotiating terms and the detail thereof. It might also be helpful if there were a provision making clear which entity is responsible for producing an agreement which complies with Articles 23(5) and 33(5). As this relates to flows of information to enable depositaries to fulfil their duties, this should be the depositary. This should avoid the possibility of both the depositary and the management company reaching different views as to what the agreement should contain in order to be UCITS compliant.

The UCITS provision requires a written agreement regulating the flow of information deemed necessary to allow the depositary to perform the functions referred to in article 22 and in other laws, regulations and administrative provisions which are relevant for the depositaries in the UCITS home Member State.

Any provisions which do not meet that specific purpose should not be included in Level 2 text. For example, numbered paragraph 1 requires a description of depositary services. This is not something related to flow of information. It also requires mention that delegation does not affect depositary liability. This does not relate to information flow and, in any event, there is no need to state this as it is set out in the UCITS Directive.

4 . Are the information flows exchanged in relation to the outsourcing of activities by the management company or the depositary relevant?

As mentioned above, only matters that are needed to enable the depositary to perform its functions should be included in the agreement. Any outsourcing provisions that do not fulfil that need should be removed. For example, information about delegations by the depositary is not required unless it is relevant to flows of information from the management company to the depositary.

5. Is it appropriate to indicate in the written agreement that each party may request from the other information on the criteria used to select delegates? In particular, is it appropriate that the parties may agree that

the depositary should provide information on such criteria to the management company?

We believe that the depositary should have the right to request such information where it is needed to enable it to fulfil its oversight duties.

We do not believe that 8a (depositary delegations) is required to meet Article 23(5) or 33(5) as it is not information necessary to enable the depositary to carry out its depositary function. It also suggests that a management company might request that the depositary monitors its delegate. A management company does not have a duty of oversight if the depositary. The depositary has a duty of oversight of the Management Company. It is the National Regulator who has the role of overseeing depositaries domiciled in its jurisdiction.

6. Is the split between suggestions for level 2 measures and envisaged level 3 guidelines appropriate?

Only critical aspects of the agreement should be at level 2, with matters covered through level 3 guidance.

It would be helpful if, at level 3, CESR produced an example agreement for a UCITS that utilises all investment powers available to it. This is likely to be helpful in conveying to depositaries and management companies the level of detail expected. This should increase understanding and potentially reduce costs as entities will have an example to work from.

7. Do you see a need for level 2 measures in this area or are the level 1 provisions sufficiently clear and precise?

Level 2 or level 3 measures which give sufficient detail to enable depositaries to be satisfied that an agreement will comply with the UCITS provisions is what is required. It will reduce uncertainty, costs and bring about a harmonised approach. It is likely to assist in making sure that the time taken to put in place agreements is as short as practicable.

8. Do you consider that the proposed standard arrangements and particulars of the agreement are detailed enough?

Subject to the removal of unnecessary provisions, the proposed requirements are satisfactory. More detail is likely to be required at level 3 so that level 2 provisions can be applied consistently. For example, numbered paragraph 1 requires the inclusion of "the procedures (including those related to the custody activity) adopted for each type of asset pertaining to the UCITS". What type of "procedures" is envisaged by this requirement and how detailed to the procedures need to be? Guidance is required. Another example relates to numbered paragraph 9 which requires "All information regarding the tasks and responsibilities in respect of obligations regarding anti-money laundering and combating the financing of terrorism, where applicable". Guidance is required on where these provisions would be applicable to the depositary and what information would the depositary require.

9. What are the benefits of such a standardisation in terms of harmonisation, clarity, legal certainty, etc... ?

The introduction of standard model for co-operation between depositaries and management companies will ultimately benefit investors by ensuring both parties can carry out their duties in an efficient manner regardless of the jurisdiction of either.

Clarity and legal certainty will lead to the avoidance of the costs that can arise when requirements are unclear.

10. What are the costs for depositaries and management companies associated with the proposed provisions?

Likely costs will depend upon how clear the requirements at level 2 and 3 are and through ensuring that only information flows required by the depositary to enable him to carry out his duties is covered. If regulatory expectations are clearly conveyed, including level of detail expected, this should reduce potential costs.

Box 3

11. Do you agree that the agreement between the management company and the depositary should be governed by the national law of the UCITS? If not what alternative would you propose?

We believe the applicable law should be for the parties of the agreement to decide as normally in commercial agreements between two parties, irrespective of the fact that some minimum requirements to the agreement will be set by EU regulations.

What are the benefits of such a proposal? Do you see costs associated with such a provision? In particular, is this requirement burdensome for the UCITS management company that will be subject to the law of another Member State regarding the agreement with the depositary?

It will be one of the costs management companies have to take into account when considering whether to avail themselves of the passport.

Box 4

13. Do you agree that investment companies should not be treated differently from common funds in respect of CESR's proposals?

We strongly agree with this proposal.

14. In your view, would such an approach impose unnecessary and/or burdensome requirements on investment companies? Would equal treatment improve the level playing field between different types of UCITS?

There should be a level playing field.

Box 5

Questions 15, 16 and 17

No for the reasons given in response to Question 2.

Section IV – Risk Management

We have already responded to the work carried out by CESR in the Risk Management Principles consultation paper of August 2008 and note much of that work carried into the level 2 proposals. However, we would like to note that the management of assets is delegated to the investment manager who is primarily responsible for managing the risks arising from the investment of those assets. It is therefore important to be aware of the distinction between the risk management function of the investment manager and the risk control function as envisaged by the level 2 proposals.

1. Do the proposals related to risk measurement for the purposes of the calculation of UCITS' global exposure (as set out in document Ref. CESR/09-489) lead to additional costs for management companies and self-managed investment companies? Please quantify your cost estimate. What are the benefits of this proposal?

We are unable to provide a cost estimate to the proposals contained within 09/489. Our response to this consultation welcomed the proposals, highlighting that the calculation methodologies for the purpose of global exposure under the commitment approach should be flexible in the complexity of its calculation (e.g. in relation to the optional use of the sensitivity approach). The benefits of the proposal are that the harmonisation of risk management will provide comfort to the regulators, managers, depositaries and investors for both the management company passport and master/feeder structures.

Box 1

2. Do you agree with CESR's proposal on the scope and objectives of the risk management policy that should be adopted by the management companies? If not, please suggest alternatives.

In general, the proposal is welcomed and has the appropriate coverage and scope. It is important that adequate level 3 guidance supports the level 2 requirements.

3. Do the proposals related to identification of risks and risk management policy lead to additional costs for management companies and self-managed investment companies? Please quantify your cost estimate. What are the benefits of this proposal?

It would be reasonable to expect an increase in cost for a company that relied on manual risk management tools as it can be assumed that any automated risk management tool would have such scope already included. Should this not be the case, there would be an increase in costs. Despite the potential cost increase, the benefit of the proposal is the standardisation of approach to risk management.

Box 2

4. Do you agree with CESR's proposal on the organisational requirements which should apply to the risk management function? If not, please suggest alternatives.

We agree with this proposal although we believe that in relation to item 4 (remuneration), the explanatory text in 12 should accompany the requirement if adopted by the Commission.

5. Do the proposals related to the risk management function lead to additional costs for management companies and self-managed investment companies? Please quantify your cost estimate. What are the benefits of this proposal?

We are unable to quantify the costs of the proposals although the benefits of harmonisation and clarity across Europe remain.

Box 3

6. Do you agree with CESR's proposals on the organisational requirements and safeguards which should apply to the risk management function in case of arrangements with third parties? If not, please suggest alternatives.

We agree with these proposals.

7. Do the proposals related to performance of risk management functions by third parties lead to additional costs for management companies and self-managed investment companies? Please quantify your cost estimate. What are the benefits of this proposal?

Providing the Management Company is carrying out periodic reviews of the third party, we do not believe that additional costs would be borne by the Management Company.

Box 4

8. Do you agree with CESR's proposals on the procedural and methodological requirements that should apply to the risk management process adopted by the management companies? If not, please suggest alternatives.

In general yes, although the proposed ongoing counterparty risk requirement (section 26) should be defined, as potentially this may lead to a real-time or intraday requirement which would create issues with UCITS undertaking OTC transactions, including simple forward FX trades.

9. Do the proposals related to the measurement and management of risks, including liquidity risks, lead to additional costs for management companies and self-managed investment companies? Please quantify your cost estimate. What are the benefits of this proposal?

In respect of Liquidity management, many UCITS will currently analyse their portfolios based on spreadsheets. There is every possibility that the proposal will require a more sophisticated approach, resulting in additional cost. This cannot be quantified.

Box 5

10. Do you agree with CESR's proposals on the requirements concerning the responsibility and governance of the risk management process? If not, please suggest alternatives.

We agree with the proposals.

11. Do the proposals related to the responsibility of the board of directors and internal reporting lead to additional costs for management companies and self-managed investment companies? Please quantify your cost estimate. What are the benefits of this proposal?

We are not aware that the proposals would result in any additional direct costs, but may require additional reporting which may incur extra costs.

Box 6

12. Do you agree with CESR's proposals on the link between the risk management policy and the valuation of OTC derivatives? If not, please suggest alternatives.

We agree with this proposal.

13. Do you agree with CESR's proposal to extend the application of the requirements set out in Box 3 (concerning the risk management activities performed by third parties) to the valuation arrangements and procedures concerning OTC derivatives (regarding both the valuation and the assessment of the valuation) which involve the performance of certain activities by third parties?

We agree with this proposal.

14. Do you agree with CESR's proposal to extend the application of the requirements set out in Box 6 to the valuation of other financial instruments which expose the UCITS to valuation risks equivalent to those of OTC derivatives? If not, please explain and suggest alternatives.

Whilst we understand that the technical input of the risk management function in the valuation of OTC derivatives is required, we do not believe that the proposals in Box 6 would be relevant to other types of financial instruments that have valuations risks equivalent to those of OTC derivatives. Furthermore, we do not believe that the risk management function should be responsible for the valuation of assets. In the UK, a fair value pricing committee is in place to provide this function. This committee may contain a member of the risk management function but will also include fund accountants, investment managers etc. This should ensure independence of the fair value pricing committee.

15. In cases where financial instruments embed OTC derivatives, do you consider it appropriate to apply the requirements referred to in Box 6 to

the valuation of the embedded derivative element of the financial instrument? Should these requirements apply to the valuation of all such instruments? Please explain your answer and, where appropriate, suggest alternatives.

As embedded derivatives are included in the calculation of the structured product's price, we do not believe that separately valuing the derivative is necessary.

16. Do the proposals related to the valuation of OTC derivatives in the context of risk management lead to additional costs for management companies and self-managed investment companies? Please quantify your cost estimate. What are the benefits of this proposal?

This will lead to additional costs, as not all Risk Management teams will currently be connected to the valuation process and may not have all the relevant expertise.

Box 7

17. Do you agree with CESR's proposals on the supervisory framework that should apply to the risk management process adopted by the management companies? If not, please suggest alternatives.

We agree with the proposals. We would like to note the current diverging practices of competent authorities in relation to the supervision and approval of the risk management framework of UCITS Management Companies.

18. Do the proposals related to authorisation processes and the supervisory approach of competent authorities lead to additional costs for management companies and self-managed investment companies? Please quantify your cost estimate. What are the benefits of this proposal?

Potentially yes, although until the exact responsibility is defined this will be difficult to estimate.

Box 8

19. Do you agree with CESR's proposals on the application to investment companies of the risk management requirements set out in this document? If not, please explain your position.

We agree with these proposals.