THE COMMITTEE OF EUROPEAN SECURITIES REGULATORS

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Consultation paper on UCITS Management Company Passport

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INTRODUCTION

Background

1. Pursuant to Directive 85/611/EEC, a UCITS, its management company and its depositary must be located in the same Member State. All activities related to collective portfolio management and administration of the UCITS are subject to the law of one Member State (*ie* the Member State in which the management company is situated) and accountable to a single enforcement authority.

2. The introduction of the management company passport would allow a UCITS to be managed by a management company authorised and supervised in a Member State other than its home Member State.

3. On 16 July 2008, the European Commission published a proposal to amend Directive 85/611/EEC, which did not include provisions with regard to the management company passport.

4. On the same day, the European Commission requested CESR's technical advice on the conditions that are needed to ensure that a management company passport is consistent with the principle that investors in funds that are managed on a cross-border basis should not be exposed to additional legal and operational risks, or lower standards of supervision than investors in domestically managed UCITS.

5. Preparation of the advice has been undertaken by the Expert Group on Investment Management. The Group is chaired by Mr Lamberto Cardia, Chairman of the Italian securities regulator, the Commissione Nazionale per le Società e la Borsa (CONSOB). This paper has been approved by CESR, however it does not reflect the views of all its Members on every individual aspect.

Areas covered by this Paper

6. The advice covers:

   i) the elements to be used to distinguish the home Member State of the management company, the depositary and the UCITS;

   ii) the allocation of regulatory responsibilities between the competent authorities responsible for all relevant entities;

   iii) the procedure for checking that the qualifications of the management company are commensurate with the demands/risks embedded in the investment policy of the UCITS, and the circumstances under which the passport could be refused;

   iv) the conditions needed to ensure that the respective competent authorities have sufficient means and information to discharge their duties effectively; the obligations incumbent on the management company vis-à-vis the UCITS and the depositary (and vice versa), and the mechanisms and procedures to ensure the timely and effective exchange of information between the UCITS and the management company competent authorities;

   v) the conditions under which effective enforcement actions can be undertaken.

Public consultation and open hearing

7. The European Commission requested CESR to submit its advice no later than 1 November 2008.

8. CESR launched a call for evidence on 17 July 2008. 29 responses to the call for evidence were received.

9. To obtain further input from external stakeholders, CESR is holding a short consultation on this paper and is arranging an open hearing on 13 October 2008 at CESR's headquarters in Paris.

10. All contributions can be submitted online via CESR's website under the heading Consultations at www.cesr.eu by 15 October 2008.

DEFINITIONS

1. "Directive": Council Directive of 20 December 1985 on the co-ordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) (85/611/EEC) as subsequently amended.

2. "Management company competent authority": the competent authority of the management company's home Member State.

3. "MCP": the management company passport.

4. "UCITS competent authority": the competent authority of the UCITS home Member State.

CHAPTER 1

Definition of domicile

Extract from the mandate from the Commission

CESR is asked to advise on the elements that could be used to distinguish the home Member State of the management company, that of the UCITS fund and that of the depositary in situations where use is made of the MCP. Particular consideration should be given to the case of UCITS funds established under contractual or trust law.

Draft CESR advice

BOX 1

Management company

1. The management company's home Member State should be the Member State in which the management company's registered office is situated or, if the management company has, under its national law, no registered office, the Member State in which the head office is situated.

2. Authorisation of the business of management companies should be granted by the management company competent authority pursuant to the provisions set out in Title A of Section III of the Directive (Conditions for taking up business).

3. The management company competent authority should not grant the authorisation unless and until such time as it is fully satisfied that the applicant complies with all requirements under the provisions adopted pursuant to the Directive.

4. The management company competent authority should refuse or withdraw authorisation where factors, such as the programme of operations, the geographical distribution or the activities actually carried on indicate clearly that a management company has opted for the legal system of one Member State for the purpose of evading the stricter standards in force in another Member State within the territory of which it intends to carry on or does carry on the greater part of its activities.

5. The authorisation should be valid for the entire Community and should allow a management company to provide the services or perform the activities, for which it has been authorised, throughout the Community, either through the establishment of a branch or under the free provision of services.

Explanatory text

1. The provisions on the domicile and the authorisation of the management company should be in line with those provided for other financial intermediaries and namely by MiFID (Directive 2004/39/EC). Moreover, a management company can provide the service of individual portfolio management which is regulated by reference to MiFID. It makes sense to follow the same approach with respect to the domiciliation of the management company. This was also supported by a number of respondents to the call for evidence.

2. It is therefore proposed that a management company be deemed to be situated in the Member State in which it has its registered office. According to the Directive (art. 5a), both the head office and the registered office of the management company shall be located in the same Member

State. Where the management company has no registered office under its national law, the management company would be deemed to be situated in the Member State in which its head office is situated. This is consistent with art. 4(1)(20) of MiFID relating to the domicile of investment firms.

3. It is relevant to ensure that the management company performs the relevant activity also in the Member State in which it was authorised. Namely, it is important that the management company be authorised to manage at least one UCITS in its home Member State. To this end, it could be useful to include in the advice a reference to recital 8 of Directive 2001/107/EC.

4. The authorisation of the business of management companies should be granted by the management company competent authority. The authorisation may not be granted if the management company does not comply with all requirements under the provisions adopted pursuant to the Directive.

5. The authorisation should be valid throughout the Community and it should permit the management company to set up and manage UCITS in Member States other than its home Member State, either through the establishment of a branch or the free provision of services (see MiFID art. 6.3). It will be the decision of the management company to select whether to provide the service in the host country via a branch or under the free provision of services.

6. Under the present Directive an asset management company can provide the services of individual portfolio management and advice through a branch or under the free provision of services. Moreover, pursuant to Directive 2003/41/EC on the activities and supervision of institutions for occupational retirement provision (see Art. 19), the principle is already stated that Member States shall not restrict institutions[1] from appointing, for the management of an investment portfolio, investment managers established in another Member State and duly authorised for this activity in accordance with Directive 85/611/EEC (…)"[2].

7. Therefore, the sole activity which cannot be provided through a branch or under the free provision of services is the management of a UCITS. European entities, however, make great use of delegation and the management of a large number of UCITS is delegated by the management company of the fund to management companies established in different Member States.

8. It is therefore necessary to insert expressly in the text of the Level 1 measures the principle of the validity of the authorisation to manage UCITS throughout the Community to avoid any misunderstanding on the scope of the authorisation of the management company.

9. As in the *acquis*, the management company will remain responsible for the activity performed by a branch, which does not itself have legal personality.

10. It should be understood that a branch should not be allowed to perform the activity of collective portfolio management in other Member States on a cross border basis through the freedom to provide services (i.e. to set up as a branch in other member States different from the home Member State) to ensure a smooth functioning of the system and avoid further complexity. In fact, in such a case, three authorities - the home authority of the management company, the host authority of the branch and the home authority of the fund - could be involved in sharing the supervision.

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[1] According to Article 6 of Directive 2003/41/EC, "institution" means "an institution, irrespective of its legal form, operating on a funded basis, established separately from any sponsoring undertaking or trade for the purpose of providing retirement benefits in the context of an occupational activity on the basis of an agreement or a contract agreed:
- individually or collectively between the employer(s) and the employee(s) or their respective representatives, or
- with self-employed persons, in compliance with the legislation of the home and host Member States, and which carries out activities directly arising therefrom".

[2] See also Recital 35 of Directive 2003/41/EC, according to which" restrictions regarding the free choice by institutions of approved asset managers (…) limit competition in the internal market and should therefore be eliminated".

Questions for consultation:

Do you agree with CESR's proposals in Box 1?

Draft CESR advice

BOX 2

UCITS

1. The UCITS home Member State for common funds constituted under the law of contract or trust law should be the Member State in which the management company has applied for authorisation of the UCITS and in which the depositary of the UCITS is established.

2. The UCITS should be regulated in accordance with the law applicable in its home Member State.

3. A UCITS should be authorised only if the UCITS competent authority has approved the choice of the management company, the fund rules and the choice of depositary.

Explanatory text

1. As supported by a majority of respondents to the call for evidence, the common fund constituted under the law of contract or trust law should be deemed to be situated in the Member State in which the management company has applied for authorisation of the UCITS and in which the depositary is established.

2. Each common fund should constitute a separate pool of assets, separate for all intents and purposes from the assets of the management company, as well as from any other assets managed by the same company, and from those of the depositary. The beneficial owners of the independent pool of assets are "pro quota" the unit holders each by virtue of the units held. The law which will be applied to the liquidation of the assets should be the law of the Member State of the UCITS (see box 5 and box 6).

3. The authorisation of the UCITS may not be granted if the UCITS is legally prevented from marketing its units or shares in its home Member State (see Article 4(3a) of the Directive).

4. As pointed out in Box 8 below, the authorisation of the UCITS should be subject to the approval of the fund rules and of the choice of the management company and the depositary by the UCITS competent authority. However, for these purposes, no discrimination could be made between domestic management companies and management companies having their registered and head office in another Member State. The reference to the approval of the choice of depositary for common funds is consistent with the *acquis* (Art. 4 of the Directive which states that "*a unit trust shall be authorized only if the competent authorities have approved the management company, the fund rules and the choice of depositary*").

5. The procedure for the authorisation is detailed in Box 8, below.

Questions for consultation:

Do you agree with CESR's proposals in Box 2?
Do you consider that additional criteria should be set to define the domicile of contractual funds? Please provide details.

Draft CESR advice

BOX 3

Local point of contact in case of common funds

1. If the management company of a common fund is not established in the UCITS home Member State, it should appoint a financial institution or the depositary subject to prudential supervision established in that State, including through a branch, to act as a local point of contact for investors and the UCITS competent authority.

2. The local point of contact should perform the following functions:

- maintain relations with unit-holders, including receipt of complaints;
- provide a legal address for receipt of all documents addressed to the UCITS and the management company by investors and by the UCITS competent authority;
- provide facilities to the unit-holders in relation to the exercise of their rights, including facilities in relation to payments to unit-holders and to the reception and transmission of orders for subscriptions, issuance and redemption of units;
- make information available at the request of the public or the UCITS competent authority.

Explanatory text

1. As also suggested by some respondents to the call for evidence, the advice makes clear that, in case of common funds managed by a remote management company under the free provision of services, there is a need to designate an entity to act as a point of contact. This aims to facilitate contact between UCITS unit-holders with a remote management company in respect to the exercise of their rights, access to documentation, and the filing of complaints, requests and documents addressed to the UCITS and the management company. It could also help the UCITS competent authority to liaise with the remote management company. Moreover, the role of local point of contact could also be played by a local representation of the management company itself. The appointment of local point of contact should not be necessary in the case of management of the UCITS through a branch, since the branch ensures a local representation of the management company.

2. In particular, this entity would have an important role to play in providing a permanent legal address in the home Member State of the UCITS, in making available as soon as possible the information and documents which UCITS are obliged to provide to unit-holders and the UCITS competent authority. It should also be the local point of contact with respect to payments to the unit-holders and receiving and transmitting orders for subscriptions, issuance and redemptions of units, without prejudice to other entities providing the service. Investors may serve legal documents in relation to claims against the UCITS and the management company at the office of the local point of contact.

3. Taking into account the role played vis-à-vis investors and the UCITS competent authority, the advice proposes that the local point of contact should be either a local representation of the firm itself or another financial institution (investment firm, bank or management company) subject to prudential supervision and established (including via a branch) in the country of the UCITS, in accordance with the relevant provisions of the UCITS Member State national law. The local point of contact should be qualified and capable of undertaking the functions indicated in Box 3.

4. The activities described in Box 3 can be performed by the depositary. However, this should in no case affect its independence and the liabilities of the depositary vis-à-vis the unit holders and

the competent authorities. Member States may not make the establishment of a point of contact or the provision of that role subject to any requirement to provide endowment capital or to any other measure having equivalent effect.

5. The presence of the local point of contact should in no case affect the management company's liability with respect to the management of the UCITS.

Questions for consultation:

Do you agree with CESR's proposals in Box 3?
Do you agree that there is an interest for investors and the UCITS competent authority in having the functions indicated in Box 3 performed by an entity located in the same Member State as the UCITS?
Do you believe that there is an interest for investors and the UCITS competent authority in having a legal address in the jurisdiction where the UCITS is located?
Do you consider that the local point of contact should provide additional functions, and namely the maintenance of the unit-holder register?

Draft CESR advice

BOX 4

Depositary

1. The depositary should either have its registered office in the UCITS home Member State or be established in that Member State if its registered office is in another Member State.

2. A UCITS should be authorised only if the UCITS competent authority has approved the choice of the depositary.

3. The depositary and the management company should sign a written agreement regulating the flow of information deemed necessary to allow the depositary to perform the functions referred to in Articles 7 and 14 of the Directive.

4. A depositary should, in accordance with the national law of the State in which the UCITS is authorised, be liable to the management company and to the unit-holders for any loss suffered by them as a result of its unjustifiable failure to perform its obligations or its improper performance of them.

5. A depositary should be an institution which is subject to on-going supervision by its home competent authority, including for prudential purposes.

6. The Commission, in accordance with the procedure set out in article XX, should provide for implementing measures on the measures to be taken by the depositary in order to fulfil its duties in the case of UCITS managed by a management company established in another Member State, including possible standard agreements to be used by depositary and management company.

Explanatory text

1. The depositary should have its registered office or be established in the Member State of the UCITS.

2. As provided for in the Directive (see Art. 4.2), the choice of the depositary is a condition for the authorisation of the UCITS. The advice proposes that the choice of the depositary should be

approved by the UCITS competent authority, rather than by the management company competent authority as set out by recital 8 of Directive 2001/107/EC, since it has to be established in the UCITS home Member State, and it should give the UCITS competent authority confidence in its ability to perform its functions, including in the case of remote management by a management company established in another Member State.

3. The advice does not propose to make changes to the current provisions on the depositary except for requesting that it is established in the country of the UCITS instead of the country of the management company. Similar adjustments have been proposed with respect to the liability of the depositary which should be regulated by the law of the UCITS home Member State (hence of the country in which the depositary is established) and no longer by the law of the management company's home Member State.

4. The advice suggests that an agreement is signed between the depositary and the remote management company to ensure an adequate flow of information across the borders. The regulation of flow of information could be included either in an ad hoc agreement, or in the general agreement between the management company and the depositary.

5. Moreover, while no changes have been made to request that the depositary is a bank, a reference has been inserted to the need for ensuring ongoing supervision of the depositary by its home competent authority, including from a prudential point of view.

6. As largely supported by the respondents to the call for evidence, a greater degree of harmonisation of the duties of the depositary would smooth the functioning of the management company passport. Therefore the advice envisages that additional measures might be established at Level 2. Such measures could enhance convergence of requirements that depositaries are expected to comply with in the performance of their duties under the Directive, when UCITS are managed by a remote management company.

7. Certain members of the Group, as well as many respondents to the call for evidence, suggested that greater convergence in this field would be a benefit also with respect to domestically managed UCITS.

Questions for consultation:

Do you agree with CESR's proposals in Box 4?
Do you consider that there is an interest for investor in harmonising the possible standard agreements to be used by depositary and management company?

CHAPTER 2

Applicable law and allocation of supervisory responsibilities

Extract from the mandate from the Commission

CESR is asked to review the current specification of provisions of UCITS law that are binding at the level of the management company and at the level of the fund and depositary, and advise on whether the envisaged allocation of responsibilities are sufficiently complete and effective to cater for situations where the management company and UCITS fund are in different Member States.

In particular, CESR is asked to identify and propose solutions to any identified gaps in supervision or overlapping responsibilities that might arise if the management company and fund/depositary are located in different Member States.

CESR is asked to advise on whether formal structures (e.g. colleges of supervisors or MoUs) are needed to underpin cooperation between competent authorities responsible for management company and the UCITS fund.

Draft CESR advice

BOX 5

Applicable law and allocation of responsibilities in the case of free provision of services

1. Member States should ensure that any management company authorised and supervised by the competent authority of another Member State providing the activity of cross border management of UCITS through the free provision of services is not subject to any additional requirement established in the UCITS home Member State in respect of the matters covered by the Directive, except in the cases expressly referred to in the Directive.

2. Management companies authorised in a Member State other than that of the UCITS providing the service of cross border management of UCITS through the free provision of services should comply with the rules of the UCITS home Member State which relate to the constitution and functioning of the UCITS and namely the rules applicable to:

- set up of the UCITS;
- fund rules;
- authorisation of the UCITS;
- format/contents of the unit holder register;
- exercise of unit holders' voting rights;
- investment policies and limits;
- calculation of total exposure and leverage;
- restrictions on borrowing, lending and uncovered sales;
- valuation of UCITS assets and UCITS accounting;
- issuance and redemption of units or shares;
- calculation of the issue price and/or redemption price;
- distribution or reinvestment of the income;
- disclosure (prospectus, KID, periodic reports);
- marketing/distribution of the units;
- relationship with unit holders (customer enquiries);

- merging and restructuring of UCITS;
- winding up and liquidation of the UCITS.

3. The management company should comply in all cases with the obligations set out in the fund rules and/or in the prospectus. The Commission, in accordance with the procedure set out in article XX, should adopt implementing measures that specify the scope and content of the fund rules.

4. The UCITS competent authority should be responsible for supervising compliance with respect to the matters listed under paras. 2 and 3 above.

5. The management company should comply with the organisational measures (including risk management process and conflict of interest procedures) provided for in its home Member State. The UCITS competent authority should be satisfied that the management company's risk management process and conflict of interest procedures are adequate for the UCITS which is proposed to be managed, based on the description of the risk management process and the information on arrangements for dealing with conflicts of interest delivered to it by the management company (as required under Box 8).

6. A management company providing the activity of management of UCITS under the free provision of services should comply with the rules of conduct (including for conflicts of interest) provided for in its home Member State.

7. The Commission, in accordance with the procedure set out in article XX, should adopt implementing measures that specify the organisational and operating conditions to be complied with by management companies in the performance of the activity of collective portfolio management, including:
- organisational requirements;
- risk management;
- conflicts of interest;
- conduct of business rules.

Until adequate harmonisation measures are taken at level 2, the management company should comply with the rules provided for in the home Member State where the UCITS is located as regards delegation arrangements, the risk management, the conflicts of interests and other relevant conduct of business rules.

8. The management company should inform the UCITS competent authority, at the moment of the UCITS authorisation and subsequently in case of relevant changes, about the intended delegation arrangements. The UCITS competent authority may ask the management company for further information necessary to ensure compliance with the rules for which it is responsible.

9. The Commission, in accordance with the procedure set out in article XX, should adopt implementing measures which specify the activities which can be delegated.

10. In order to simplify access to information in the case of management companies authorised in a Member State other than that of the UCITS, Member States should ensure that complete information on the non-harmonised laws, regulations and administrative provisions relating to the establishment and on-going activities of management companies, and to the constitution and functioning of the UCITS, is easily accessible at distance and by electronic means. Member States should ensure that this information is available in a language customary in the sphere of international finance, is provided in a clear and unambiguous manner, and is kept up to date.

Explanatory text

1. This part of the advice deals with the conditions that should be complied with by the management company performing the functions of collective portfolio management in free provision of services. As supported by most respondents to the call for evidence, the split of responsibilities between the management company competent authority and the UCITS competent

authority is a key area to ensure smooth functioning of the passport. The mandate from the European Commission to CESR pointed out the need for a clear and systematic allocation of regulatory responsibilities between the competent authorities responsible for the relevant entities. The advice therefore provides for an exhaustive list of subject matters governed by the law of the UCITS home Member State and supervised by the UCITS competent authority.

2. The principle should be preserved according to which the rules governing the constitution and functioning of a UCITS should be the same irrespective of whether it is managed by a domestic management company or by a foreign management company via a branch or under the free provision of services. Otherwise investors could be easily misled.

3. The proposed advice indicates that the rules governing the constitution and functioning of the UCITS (rules on investment limits, NAV calculation, periodic reports, exercise of voting rights, etc.) should be those of the UCITS home Member State and be supervised by the UCITS competent authority. The proposal to make the format and contents of the unit-holder register subject to the law of the UCITS home Member State is without prejudice to the location where the register is maintained.

4. As emphasised by most respondents to the call for evidence, it should be taken into account that the management company should be able to manage UCITS under the free provision of services without duplicative and burdensome requirements. The management company, therefore should be subject to its domestic rules on prudential matters and conduct of business, unless expressly otherwise provided in the Directive.

5. There are areas which could be identified as borderline, such as internal organisation, risk management or conflicts of interest. Conflicts of interest are relevant with respect to both conduct of business rules and organisational arrangements as already applicable for the management companies which provide the service of individual portfolio management which is regulated under MiFID. The low level of harmonisation in the current Directive renders this issue particularly sensitive. In this regard, the advice proposes that the remote management company in the free provision of services (or through establishment of a branch) should comply with the organisational requirements and procedures (including risk management process and conflicts of interest procedures) set down by its home Member State; the management company competent authority should supervise compliance with the said rules. However, it is proposed that the UCITS home competent authority should be satisfied that the management company's risk management process and conflicts of interest procedures are adequate for the UCITS which is proposed to be managed.

6. As provided for in MiFID the advice specifies that a Member State should not make the free provision of the services subject to any authorisation requirement to provide endowment capital or to any other measure having equivalent effect.

7. The advice recommends that additional measures are introduced at Level 2 to introduce a sufficient degree of harmonisation to render duplication of rules and functions unnecessary or extremely limited. Harmonisation of organisational requirements, risk management, conflicts of interest and conduct of business rules is essential for the functioning of the management company passport. In the area of conduct of business, guidance should be provided on issues such as churning, soft commission arrangements, timely allocation of transactions/market timing, late trading, underwriting, etc. This approach should foster confidence among competent authorities and allow for the home country principle (as management company home country) to be fully implemented.

A broad harmonisation could allow for a full alignment of the UCITS Directive to the MiFID where the conduct of business rules to be complied with are those of the management company home Member State in the case of free provision of services and those of the management company host Member State in the case of branches.

8. In order to ensure that there would not be an unlevelled playing field between UCITS depending on which is the management company, the advice proposes that, until adequate harmonisation measures are taken at level 2, the management company should comply with the delegation arrangements, risk management, conflicts of interest and other relevant conduct of business rules applicable under the law of the UCITS home Member State. It should be recognized that the present Directive, unlikely other pieces of Community legislation such as MiFID, only contains general principles in the above mentioned areas. This has paved the way to different implementations and supervisory approaches. In order to ensure an adequate level of investor protection as well as the level playing field inside the Community, it is appropriate to provide for a transitional measure. Such a transitional measure will not be necessary in case appropriate Level 2 measures are enacted before the entry into force of the amended Directive. Harmonisation will easy the coordination between the competent authorities and could allow for a further simplification of the authorisation procedure for the UCITS remotely managed and improve on-going supervision.

9. In all cases the additional measures necessary to comply with the rules of the UCITS should not be excessive and render *de facto* impracticable the use of the passport.

10. Another sensitive issue for the level playing field to be dealt with is delegation. Article 5g of the present Directive contains a number of detailed rules on delegation. However, differences in the implementation have been observed, namely in the area of the functions which can be delegated.

11. The proposal is to refer to the law applicable to the management company, whose competent authority should be responsible for supervising compliance with the rules on delegation. Article 5g, para. 1, lett i) of the Directive, however clearly states that the functions that the management company has been permitted to delegate must be listed in the prospectus. The advice proposes that the UCITS competent authority be informed about the intention of the management company to delegate functions, and which functions, by including the information in the package to be provided at the moment of the authorisation of the UCITS, moreover the information should be provided in the prospectus. The UCITS competent authority may ask the management company for information and in case of doubts of non-compliance should consult with the management company competent authority. The UCITS competent authority should have the right of being informed in case of any changes to the delegation arrangements.

12. Level 2 measures may mitigate the differences in approaches in Member States and therefore it is essential that further work is carried out with respect to delegation.

11. In order to facilitate knowledge of the relevant domestic information, it should be provided that the information is made available to the public via the web-site of the relevant competent authorities. This should cover only the information which falls within the remit of the relevant competent authority. A similar arrangement has been agreed within CESR on notification and marketing information under the present Directive. This proposal is also consistent with the draft Directive proposed by the European Commission.

Questions for consultation:

Do you agree with CESR's proposals in Box 5?
Do you agree that further harmonisation in the areas indicated in Box 5 above will be beneficial for ensuring a level playing filed and adequate investor protection in the European market?
Do you suggest other areas that would benefit from further harmonisation?

Draft CESR advice

BOX 6

Applicable law and allocation of responsibilities in the case of establishment of a branch

1. Member States should not impose additional requirements, save those allowed under this Directive, on the organisation and operation of the branch in respect of the matters covered by this Directive.

2. Management companies authorised in a Member State other than that of the UCITS providing the service of cross border management of UCITS by the establishment of a branch should comply with the rules of the UCITS home Member State which relate to the constitution and functioning of the UCITS and namely the rules applicable to the subject matters indicated in box 5, para. 2.

3. The management company should comply in all cases with the obligations set out in the fund rules and/or in the prospectus. The Commission, in accordance with the procedure set out in article XX, should adopt implementing measures that specify the scope and content of the fund rules.

4. The UCITS competent authority should be responsible for supervising compliance with respect to the matters listed under paras. 2 and 3 above.

5. The management company should comply with the organisational measures (including risk management process and conflict of interest procedures) provided for in its home Member State. The UCITS competent authority should be satisfied that the management company's risk management process and conflict of interest procedures are adequate for the UCITS which is proposed to be managed, based on the description of the risk management process and the information on arrangements for dealing with conflict of interests delivered to it by the management company (as required under Box 8).

6. The competent authority of the Member State in which the branch is located should assume responsibility for ensuring that the services provided by the branch within its territory comply with the rules of conduct applicable in the host Member State of the branch.

Explanatory text

1. This part of the advice deals with the conditions that should be complied with by the management company performing the functions of collective portfolio management via branches.

2. With regard to the rules governing the constitution and functioning of a UCITS (rules on investment limits, including limits concerning conflicts of interest; NAV calculation; periodic reports; exercise of voting rights, etc.), the advice proposes to adopt the same approach as for the free provision of services. These rules should be those of the UCITS home Member State and be supervised by the UCITS home competent authority.

3. With respect to applicable rules, except those referred to above, the branch should be treated as provided for in MiFID (particularly with reference to the scope of the rules of conduct). The branches of management companies currently providing the service of individual portfolio management must already comply with MiFID rules. It would be burdensome and inconsistent to require the branches to follow a different regime.

4. As provided for in MiFID the advice specifies that a Member State should not make the establishment of a branch subject to any authorisation requirement to provide endowment capital or to any other measure having equivalent effect.

Questions for consultation:

Do you agree with CESR's proposals in Box 6?

Draft CESR advice

BOX 7

Co-operation between competent authorities

1. For the purpose of ensuring adequate supervision of the UCITS, the depositary and the management company, the competent authorities should have the power to conclude bilateral and/or multilateral co-operation agreements with the competent authorities of EU Member States that may involve mutual delegation of supervisory tasks. Such agreements may involve one or more competent authorities sharing supervisory tasks over UCITS which are managed through the freedom to provide services or through branches, depositaries and management companies.

2. The competent authorities should have the power to take part in permanent structures established by the co-operation agreements described under paragraph 1 above, defined as colleges of supervisors.

3. The Commission, in accordance with the procedure set out in article XX, may adopt implementing measures concerning co-operation between competent authorities in the cases described under paragraphs 1 and 2 above.

Explanatory text

1. For the purposes of ensuring effective enforcement of the Directive, and as suggested by several respondents to the call for evidence, it is important to enhance convergence of powers at the disposal of competent authorities to conclude bilateral or multilateral co-operation agreements.

2. Namely, it is important to establish at Level 1 the obligation for Member States to entrust the competent authorities with powers to conclude co-operation agreements and where necessary to delegate tasks and/or set up permanent structures such as colleges of supervisors. Standards for agreements, and circumstances in which such agreements are necessary, could be established subsequently at Level 2.

Questions for consultation:

Do you agree with CESR's proposals in Box 7?

CHAPTER 3

Authorisation procedure for UCITS fund whose management company is established in another Member State

Extract from the mandate from the Commission

CESR is requested to advise on the need for and design of mechanism or process which will allow for checking that qualifications of the management company (authorised in another Member State) are commensurate with the demands/risks embedded in the investment policy of the UCITS fund.

CESR is asked to advise on any duly motivated circumstances under which a management company could be refused permission to manage/set up a fund in another Member State.

Draft CESR advice

BOX 8

UCITS authorisation

1. The competent authority of the UCITS home Member State may authorise a UCITS only if it has approved the fund rules, the choice of the management company and the choice of the depositary.

2. The UCITS should not be legally prevented from being marketed in its home Member State.

3. The UCITS competent authority cannot require UCITS to be managed by management companies having their registered office in that Member State.

4. The competent authority of the UCITS home Member State should approve the choice of the management company when it is satisfied that:

(i) the management company is duly authorised by its home competent authority to manage UCITS of the type for which the authorisation is requested, based on documents submitted in accordance with paras. (5), (7) and (8) below;

(ii) the management company will be able to comply with the provisions which fall within its own remit of competence and that the management company's risk management process, conflicts of interest procedures and proposed delegation arrangements are adequate for the type of UCITS which is proposed to be managed;

(iii) the choice of the management company does not prevent the effective exercise of its supervisory functions.

5. The management company competent authority should provide the management company with an attestation certifying that the management company fulfils the conditions imposed by the Directive. The attestation should also certify that the organisational arrangements set up in the country of establishment and the systems and controls put in place comply with the relevant rules applicable to the activity performed and are adequate taking into account the type of UCITS to be managed. The attestation should be drawn up in a language customary in the sphere of international finance.

6. The attestation should be provided on the first occasion a management company applies for an authorisation to set up and/or manage a UCITS in the host country. In the case of subsequent requests for authorisation, a reference to the document already provided should suffice if there are no material changes since the original attestation.

7. Without prejudice to the other documents to be filed for the authorisation of the UCITS (fund rules, prospectus, KID, distribution arrangements, etc.), a management company which applies for an authorisation to set up and/or manage UCITS established in another Member State through the free provision of services, should provide the UCITS competent authority with:
- a report on the risk management process and on accounting and other internal procedures adopted by the management company with respect to the specific type of UCITS for which the authorisation is requested;
- a description of the relationship between the management company and the depositary;
- information on delegation arrangements;
- information on arrangements for dealing with conflicts of interest;
- the address in the UCITS home Member State of the financial institution acting as point of contact from which documents may be obtained and at which notices may be served;
- a description of how the management company intends to comply with requirements falling within the remit of competence of the UCITS competent authority.

8. A management company which applies for an authorisation to set up and/or manage UCITS established in another Member State through a branch should include in the detailed programme of operations provided for in Article 6a para. 2 lett. b) of the Directive information referred to under indents 1, 2, 3, 4 and 6 of para. 7 above in relation to the type of UCITS to be managed.

9. The items of information listed in para 7 should be also provided after authorisation, where there are material changes to the information submitted to the UCITS competent authority.

10. The UCITS competent authority may ask the management company for clarification and information with respect to the items of information to be provided in accordance with para. 7 above only insofar as such information is necessary to verify compliance with the rules falling within its remit. Consultation with the management company competent authority may be necessary on the matters listed under para. 7 first, third, fourth and sixth indents.

11. The UCITS competent authority should have the power to require the management company to provide information and documents needed to verify compliance with the rules falling within its remit.

12. The UCITS competent authority may refuse the approval of the choice of the management company only in the case where conditions set out in para 4 above are not complied with or the management company has seriously and/or systematically infringed the provisions adopted pursuant to the Directive. Before issuing the refusal decision the UCITS competent authority should consult with the management company competent authority. Whenever the UCITS competent authority refuses the approval of the choice of the management company, it should justify, in writing, the reasons underlying the decision.

13. The UCITS competent authority should have the power, as a last resort measure, in case a management company has seriously and/or systematically infringed the provisions adopted pursuant to the Directive, to withdraw the approval of the choice of the management company. In such a case the competent authority, in compliance with the domestic applicable provisions, should be able to take the necessary measures as to arrange for an orderly management and/or liquidation of the UCITS.

14. Neither the management company nor the depositary may be replaced, nor may the fund rules be amended, without the approval of the UCITS competent authority.

15. The Commission, in accordance with the procedure set out in article XX, should establish implementing rules designed to detail the procedure for the authorisation of the UCITS and the approval of the choice of a management company authorised in another Member State by the UCITS competent authority. Implementing rules should also specify the detailed content, timeframe and way to provide information to the UCITS competent authority about the management company and the detailed content of the programme of operation referred to under para. 8 above.

16. The Commission, in accordance with the procedure set out in article XX, should establish implementing rules dealing with cases in which disagreements occur between competent authorities, including whether mediation may be necessary.

Explanatory text

1. The above provisions are designed in order to take into account that two different authorities are involved in this process and that the UCITS competent authority needs to be able to verify that the management company is suitable for the specific type of fund to be managed. In this regard, specific consideration should be given to whether the UCITS intends to invest in derivative financial instruments.

2. The UCITS competent authority should not be able to refuse the authorisation on the grounds of nationality, or for reasons different from those listed in Box 8 dealing with the adequacy of the management company to manage a given fund. Before issuing a refusal decision, the UCITS competent authority should consult with the management company competent authority. The final decision on whether or not to approve the choice of the management company lies with the UCITS competent authority.

3. The attestation from the management company competent authority should be provided only on the first occasion a management company seeks to set up and/or manage UCITS established in the selected host Member State, either through the establishment of a branch or through the free provision of services. A new attestation should however be provided in case of material changes to the information included in the original attestation (for instance on the first occasion in which the management company intends to manage a UCITS which invests in derivative financial instruments).

4. According to the existing Directive the branch is already requested to provide a detailed programme of operations and details on the organisational structure of the branch, therefore it is only necessary to add the information specific to the UCITS to be managed.

5. The power of the UCITS competent authority to ask for additional information and clarification should be strictly limited to information and documents which are necessary for the verification of the ability of the management company to comply with rules falling within the remit of the UCITS competent authority. If a management company applies for authorisation of a UCITS in another Member State, the management company has to demonstrate that it complies with the requirements that apply in the UCITS home Member State in accordance with the split described in Box 5 and Box 6. The UCITS competent authority should be satisfied that the risk management process, the arrangements adopted to prevent and manage conflicts of interest and the proposed delegation arrangements are adequate taking into account the type of UCITS proposed to be managed.

The report provided to the UCITS competent authority should, in particular, contain a description which should allow the UCITS competent authority to verify compliance of the risk management process with the requirements of the UCITS Directive to capture the risks with respect to the specific type of UCITS for which the authorization is requested.

6. The request for additional information therefore should not relate to (for example) prudential information about the management company but would be concerned with clarifying

matters relating to the sophistication of the systems and controls around the management company's fund risk management process. Management companies should be required to keep the UCITS competent authority up-to-date with any material changes to this information.

7. Moreover, it should be ensured on an ongoing basis that the risk management process of the management company continues to remain consistent with the investment policy of the UCITS as the management company remains subject to the supervision of its home competent authority.

8. It should be taken into account that where a management company is known to the UCITS competent authority, because a UCITS it manages has already been approved in the host jurisdiction, the information requested should not duplicate information already in possession of the UCITS competent authority.

9. Except for the foregoing, the UCITS authorisation in case of management by a branch should not be different from the usual domestic authorisation procedure.

10. The details of the procedure, which could include additional safeguards in terms of timing by which a response should be given, could be provided at Level 2 or Level 3.

11. Level 2 measures could also provide for mechanisms to mediate cases in which there is a disagreement between the UCITS competent authority and the management company competent authority on the ability of the management company to manage a given fund.

Questions for consultation:

Do you agree with CESR's proposals in Box 8?
Do you agree with the role envisaged for the UCITS competent authority in the areas referred to above?

CHAPTER 4

On-going supervision of the management of the fund

Extract from the mandate from the Commission

CESR is asked to advise on the conditions (e.g. in terms of direct or indirect access to or control of certain functions or processes) needed to ensure that the supervisor of the UCITS and the supervisor of its management company have sufficient means and information to discharge their duties effectively.

CESR is asked to advise on the obligations of information and conduct of business that the management company owes to the UCITS fund and depositary (and vice versa).

CESR is asked to advise on the mechanisms or procedures that should be envisaged to ensure the timely and effective exchange of information between a UCITS supervisor and a supervisor of a management company (or vice versa).

Draft CESR advice

BOX 9

Information flow to the competent authorities

1. The management company competent authority should receive reports on the management activity performed through branches or through the free provision of services as required by domestic legislation.

2. The UCITS competent authority should receive the reports that UCITS must provide on a regular basis pursuant to the law applicable to the UCITS. The management company competent authority should also have access to those reports.

3. The Commission, in accordance with the procedure set out in article XX, may establish implementing rules for the setting up of databases containing information which can be shared by the competent authorities to reduce the burden on the management company and UCITS. The Commission, in accordance with the procedure set out in article XX, may establish implementing rules on the format and content of the reporting obligations of the UCITS and the management company with a view of reducing the burdens to which such entities are subject.

4. The UCITS competent authority may request information directly from the management company only where it is necessary to verify compliance with the rules which fall within its remit of competence as set out in Box 5 and in Box 6.

5. The UCITS competent authority should be able to request the co-operation of the management company competent authority for an on-the-spot verification or in an investigation in the management company's home Member State. Where the management company competent authority receives such a request, it should either:

- allow auditors or experts of the UCITS/management company to carry out the verification or investigation at the expenses of the management company; or

- allow the UCITS competent authority to carry out the verification or investigation. In such cases, the management company competent authority may ask that members of its own personnel accompany the personnel of the UCITS competent authority carrying out the verification or investigation; or

- carry out the verification or investigation itself. In such cases, the UCITS competent authority may ask that members of its own personnel accompany the personnel of the management company competent authority carrying out the verification or investigation. The verification or investigation should be subject to the overall control of the management company home Member State.

6. The management company competent authority should be able to request the co-operation of the depositary competent authority and the UCITS competent authority for an on-the-spot verification or in an investigation of the depositary if this is necessary with respect to the supervision of the management company. The procedure described under para. 5 above should apply to such verifications. The verification or investigation should be subject to the overall control of the Member State on whose territory the verification or investigation is carried out.

7. Competent authorities may refuse to act on a request for co-operation in carrying out an investigation or on-the-spot verification as provided for in paras 5 and 6 only where:

(a) such an investigation or on-the-spot verification might adversely affect the sovereignty, security or public policy of the Member State addressed;

(b) judicial proceedings have already been initiated in respect of the same actions and the same persons before the authorities of the Member State addressed;

(c) final judgment has already been delivered in the Member State addressed in respect of the same persons and the same actions.

In such cases, the requested competent authority should notify the requesting competent authority of any decision to refuse assistance in carrying out an investigation or on-the-spot verification. The notification shall contain information about the grounds of the decision.

8. The management company competent authority should notify immediately to the UCITS competent authority all material adverse information on the management company which could have an impact on its ability to manage the UCITS and on the protection of unit-holders.

9. The UCITS competent authority should notify immediately to the management company competent authority all material adverse information which may have an impact on the ability of the management company to perform its duties and comply with the applicable legislation.

10. The Commission, in accordance with the procedures set out in article XX, may establish implementing measures on the co-operation arrangements necessary to give effect to the obligations established in para. 4 to 9 above and in particular on the types of information falling under para. 8 and 9 above.

Explanatory text

1. As suggested by several respondents to the call for evidence, it is important to ensure that both authorities (the UCITS competent authority and the management company competent authority) receive the information which is necessary to enable them to perform their duties in accordance with the split of functions described in Box 5 and Box 6 above and that information flows are organised in such a way as to reduce the burden borne by competent authorities and market participants. The management company competent authority is responsible for ensuring that company's compliance with the operating conditions (organisation, risk management and conduct of business rules) as indicated in the Boxes 5 and 6. To avoid gaps in supervision it should,

therefore, take care that the UCITS is correctly managed from that aspect. To this end, in addition to the reports on the management activity performed through branches or through the free provision of services, the management company competent authority should have access to any regular reports related to the UCITS provided to the UCITS competent authority in accordance with the law applicable to the UCITS. Those reports which are solely addressed to competent authorities should be made available in a language which is common in the sphere of international finance. Reports which are also intended for the public will follow the linguistic regime applicable to reports to the public.

2. In a number of cases such information will be the same for both authorities (namely in the field of periodic reporting). In such cases it could be useful to set up data bases managed at the level of colleges of supervisors or under other type of agreements. This would reduce the burden on the industry.

3. Information could also be necessary on ad hoc basis. These cases can be examined:

- Reactive information on a periodic or ad hoc basis provided by the management company, the depositary or the independent auditor.

  The UCITS competent authority should be entitled to request its usual information from that UCITS. In certain cases information may be provided only by the management company. However, the UCITS home Member State should not be able to impose additional routine reporting requirements on UCITS/management company simply because UCITS are managed by a foreign management company.

  It should be acceptable that from time-to-time the UCITS competent authority may need to make ad hoc information requests to remote management companies.

  In terms of conduct of business rules, the high-level conduct of business principles already in the Directive could be expanded upon generally at Level 2, possibly in line with standards established under MiFID as already outlined in Box 5 above.

- Proactive information where the UCITS competent authority carries out an on-site inspection or investigation at the management company, and the management company authority carries out an on-site inspection or investigation at the depositary in the UCITS home Member State.

  Due to its functions prescribed by the Directive, the UCITS competent authority should have the right to request the cooperation of the management company authority to undertake themed inspections and investigations aimed at verifying compliance with the rules falling within its remit as set out in Box 5 and Box 6 on the management company's site(s). The management company competent authority may either carry out the inspection or investigation itself, or allow the requesting authority to carry out the inspection or investigation, or rely on the auditors or experts.
  It could also be useful to provide for the right of the management company competent authority to request the cooperation of the UCITS competent authority or the depositary competent authority to carry out on-the-spot inspections or investigation on the depositary with respect to the supervision of the management company. This could be necessary for instance in case of serious violations to ascertain the precise position of the entities involved.

  It should be highlighted that the procedure to be followed in the course of on-the-spot verifications should be the procedure applicable in the country of the inspected entity.

  The advice proposes that a competent authority may refuse to act on a request for cooperation in carrying out an investigation or on-the-spot verification in limited circumstances, and that the grounds for the refusal should be notified to the requesting authority. The mechanism suggested is part of the *acquis* since it has been included in

Article 59 of MiFID as well as in Art. 16 of the Market Abuse Directive; it is also included in the new proposal for the Directive published by the European Commission.

4. An analysis of the current supervisory practice has shown that there is a wide range of practice concerning the timing, format and content of periodic reports. It could be useful to carry out further work at Level 2 in order to obtain a greater degree of harmonisation. Implementing measures should consider the need to reduce the burden on management companies and UCITS where consistent with the goal of underpinning the current high level of investor protection.

5. Moreover, provisions should be inserted in the Directive for ensuring that adequate information on the management company's operations is provided to the UCITS competent authority and on the UCITS operations to the management company competent authority. Two categories of information could be distinguished:

- Information that is a simple update of key facts relating to UCITS / management company and is not likely to trigger any action from the respective competent authority (e.g. a change of directors in the management company); and
- Information that could raise supervisory concerns and, as the case may be, trigger action from another competent authority.

6. The second category could require specific information flows from one competent authority to the other in order to "flag" important information. It could include a finding relating to controls and inspections or breaches of common rules under the Directive or national rules either at the UCITS level or at management company's level. The Directive could differentiate between information that every competent authority has to transmit at its own initiative and information that it only has to deliver at the request of another competent authority.

7. A number of provisions have already been inserted in the new proposal for the Directive and they could take care of these aspects. It could however be useful to list at Level 2 or 3 what information competent authorities have to transmit at their own initiative to other competent authorities.

8. Unsolicited assistance should also be provided, irrespective of the information falling within one of the categories identified above.

Questions for consultation:

Do you agree with CESR's proposals in Box 9?

Draft CESR advice

BOX 10

Information flow between management company, UCITS and depositary

1. Adequate arrangements should be established to ensure the flow of information necessary for the management company, the UCITS and the depositary to perform their respective functions.

2. The Commission, in accordance with the procedure set out in article XX, should establish implementing measures with respect to the detailed information to be exchanged in accordance with para. 1 above.

Explanatory text

1. It is important to ensure that all the entities involved – the UCITS (through the financial institution acting as UCITS point of contact), the depositary and the management company - provide and receive the information which is necessary to enable each of them to perform their specific duties in accordance with the provisions laid down in the Directive.

2. It seems sufficient to set out at Level 1 the general obligation for all the parties to sign an arrangement, delegating the Commission to adopt detailed implementing measures on the information flow.

3. The management company should provide to the UCITS and to the depositary information on the investment activities carried out on behalf of the UCITS (the composition of the assets invested and all information on the calculation of the value of units, all information necessary to verify continuous compliance with the risk profile of the UCITS and information disclosed to the public in the fund rules and other disclosure documents).

4. The depositary should have in all cases the right to access the books and records held by the management company.

5. The UCITS and/or the depositary should provide the management company with information on the subscription and redemption of units.

6. The management company and the depositary should provide the financial institution acting as UCITS point of contact with any information necessary to comply with its duties to unit-holders.

Questions for consultation:

Do you agree with CESR's proposals in Box 10?

Draft CESR advice

BOX 11

Auditors

1. The audits of the UCITS and of the management company should be carried out by one or more independent auditors empowered by law to audit accounts of public-interest entities in accordance with Directive 2006/43/EC.

2. In the event that the UCITS and the management company have different auditors, their respective auditors should enter into an information-sharing agreement in order to ensure the fulfilment of the duties of both auditors.

3. In its audit report, the auditor of the UCITS should take into account the last available audit of the management company and vice versa. The auditor of the UCITS should in particular report on any relevant irregularities revealed in the last available audit report of the management company and on their impact on the UCITS and vice versa.

4. The auditor of the management company should have a duty to report promptly to the competent authorities of the management company and of the UCITS whenever, while carrying out its duties, it becomes aware of facts which are liable to have a serious effect on the financial situation or the administrative and accounting organisation of a UCITS.

5. The auditor of the UCITS should have a duty to report promptly to the competent authorities of the UCITS and of the management company whenever, while carrying out its duties, it becomes

aware of facts which are liable to have a serious effect on the financial situation or the administrative and accounting organisation of a management company.

6. Competent authorities should be able to ask for information and documents from the respective auditors of the UCITS and of the management company to monitor compliance with the rules which fall within their remit of competence as set out in Box 5 and Box 6.

7. Member States should ensure that any costs associated with compliance with paragraphs 4, 5 and 6 should not be charged, either directly or indirectly, to the UCITS or the unit-holders.

8. The Commission, in accordance with the procedure set out in article XX, should establish implementing measures with respect to the particulars that need to be included in the agreement referred to in para. 2.

Explanatory text

1. The advice proposes that the respective auditors of the UCITS and the management company be independent auditors carrying out public-interest functions under the Statutory Audit Directive (Directive 2006/43/EC) and, as suggested by some respondents to the call for evidence, enter into a binding and enforceable agreement to ensure the flow of information and documents that is needed for such auditors to fulfil their duties.

2. The Directive already requests auditors to notify the competent authority where they discover serious irregularities in the performance of their duties. In cases of remote management, these duties to report should apply in respect of both competent authorities in order to ensure effective supervision and adequate investor protection. This provision therefore should need to be coordinated with those already included in the current proposal for a Directive issued by the European Commission.

3. The competent authorities should be able to gather information and documents from the respective auditor(s) of the UCITS and of the management company in order to ensure compliance with the rules falling within their remit of competence.

4. The costs should not be charged to the unit-holders. This should not impact on investment funds since the rules apply in a context of remote management and it is therefore clear that the advice does not refer to self-managed investment funds.

Questions for consultation:

Do you agree with CESR's proposals in Box 11?

CHAPTER 5

Dealing with breaches of rules governing the management of the fund

Extract from the mandate from the Commission

CESR is asked to advise on any mechanisms or information flows that are needed to ensure that the respective competent authorities are duly and quickly informed of any breach of the rules governing the management of the fund; and the conditions under which effective enforcement action can be undertaken.

CESR is invited to advise on the need for and form of any additional measures to facilitate effective enforcement action by authorities responsible for a contractual form UCITS fund when the management company is established in another Member State.

Draft CESR advice

BOX 12

1. In the case of UCITS managed through branches or under the freedom to provide services, the UCITS competent authority should be able to impose directly appropriate administrative sanctions and measures for violation of the rules which fall within its exclusive remit. The Member State should ensure that these sanctions are effective, proportionate and dissuasive.

2. If such sanctions and measures are to be imposed upon entities established in another Member State, the UCITS competent authority should inform the management company competent authority. Such authority can make representations to the UCITS competent authority about the type of measure and/or level of sanction involved.

3. The management company competent authority should be able to serve the legal documents necessary to enforce the sanctions or measures taken by the UCITS competent authority against the relevant entity/person.

3. If the conditions under which the choice of the management company was approved are no longer fulfilled and the interests of unit-holders are prejudiced or the management company has seriously and/or systematically infringed the provisions adopted pursuant to the Directive, the UCITS competent authority should have the power, as a last resort measure, to withdraw the approval of the choice of the management company. In such a case the competent authority, in compliance with the domestic applicable provisions, should be able to take the necessary measures so as to arrange for an orderly management and/or liquidation of the UCITS. The UCITS competent authority should also have the power to require the management company to suspend the issue and repurchase or redemption of units in the interest of the unit-holders or of the public.

Explanatory text

1. The text of the proposed Directive already contains a number of improvements in the area of co-operation and, specifically, in the area of precautionary measures and notification of breaches of laws, which could be relied upon also in respect of remote management of UCITS. It is understood that under the new Directive the management company competent authority should provide cooperation and assistance as may reasonably be requested by the UCITS competent

authority for the purpose of investigating any actual or alleged breaches of the rules made or introduced pursuant to the Directive.
These procedures could be useful also in the context of cross border management where an authority discovers breaches which should be punished by the home competent authority (of the management company or of UCITS as the case may be). This could be the case for violations concerning operating conditions of the management company or concerning certain conduct of business rules. As in other Directives (see Market Abuse Directive) it is requested that the sanctions are effective and proportionate to the wrongdoings detected by the relevant competent authority.

2. The issue of information flows has already been treated in the preceding Box 9. Concerning the issue of enforcement, it should be borne in mind that the UCITS competent authority should be endowed with sufficient powers to ensure directly or indirectly (with support from the management company competent authority) that the management company is in compliance with the laws applying to the UCITS.

3. However, it should be recognised that there are violations of laws that refer to rules falling within the exclusive competence of the UCITS competent authority that need to be enforced directly and cannot be subject to an evaluation by the management company competent authority. This could be the case for violations concerning the provisions on disclosure or the violation of the fund rules. The UCITS competent authority should be able to impose pecuniary sanctions directly upon the management company, if the violation is committed by the management company, and to publish the action taken if it considers doing so to be in the public interest.

4. The peculiar situation of the management of a UCITS established under the legislation of another country and subject to the exclusive supervision of such authority for the subject matters indicated in Boxes 5 and 6 requires that this authority can impose sanctions or measures for violation of rules falling within its remit, in accordance with its domestic law, upon entities/persons established abroad. It is therefore necessary to add at Level 1 a mechanism which recognizes such right and provides for the possibility to serve legal documents by relying on the co-operation of the management company competent authority. The mechanism suggested is part of the *acquis* since it has been included in Article 4 of Directive 2004/25/EC (Takeover bid).

5. Moreover, as also suggested by several respondents to the call for evidence, the advice proposes the UCITS competent authority be empowered, as a last resort measure, to withdraw the approval of the choice of the management company. In such a case the UCITS competent authority, in compliance with the domestic applicable provisions, should be able to take the necessary measures so as to arrange for an orderly management and/or liquidation of the UCITS. The UCITS competent authority should also be empowered to order the suspension of the issue and repurchase or redemption of units in the interest of the unit-holders or of the public.

Questions for consultation:

Do you agree with CESR's proposals in Box 12?

Draft CESR advice

BOX 13

1. In no case should the management company's or the depositary's liability be affected by the fact that the UCITS was set up and/or is managed by a management company established in another Member State.

2. The right of a unit-holder to claim for damages in case of infringement of the provisions of the Directive should not be treated differently depending on whether a UCITS is managed by a management company established in the same or another Member State.

3. Claims against a UCITS and the management company in relation to the management of a UCITS should be lodged by investors with a judicial authority established in the UCITS home Member State in accordance with the law applicable to the UCITS.

4. Member States should promote the setting up or development of efficient and effective out-of-court complaints and redress procedures for the settlement of consumer disputes concerning management of UCITS, using existing bodies where appropriate.

5. Member States should, in particular, ensure that those bodies are not prevented by legal or regulatory provisions from co-operating effectively in the resolution of cross-border disputes.

6. Unit-holders should receive appropriate information before they invest concerning the existence of any out-of-court complaint and redress mechanism and the methods for having access to it.

Explanatory text

1. It is important, in order to keep the principle of the irrelevance of the place of establishment of the management company, that investors are able to seek compensation for damages in Court in the UCITS home Member State. No additional measures are necessary since these matters should continue to be regulated under national regulations.

2. The advice points out the need for suitable and effective complaint and redress procedures in the Member States. Complaint and redress procedures should also be useful to settle potential cross-border disputes where the management company passport is used.

3. Public or private bodies established with a view to settling disputes out of court should be allowed to co-operate in resolving cross-border disputes. Such co-operation should in particular entail consumers submitting complaints concerning a management company established in another Member State to extra-judicial bodies in the Member State of their residence.

4. Existing cross-border co-operation mechanisms, notably the Financial Services Complaints Network (FIN-Net), may be used, where appropriate.

5. The advice points out the right of unit-holders to receive information about such out-of-court redress mechanisms.

Questions for consultation:

Do you agree with CESR's proposals in Box 13?