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# ***CP86: Consultation on Fund Management Company Effectiveness***

## ***Responses from Independent Directors***

*Delegate oversight  
consultation*

*12 December 2014*



Fund Management Company Effectiveness – Delegate Oversight Consultation,  
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Sent by email to: [fundspolicy@centralbank.ie](mailto:fundspolicy@centralbank.ie)

12 December 2014

Dear Sir/Madam,

**CP 86 - Consultation on Fund Management Company Effectiveness – Delegate Oversight**

In response to the Central Bank of Ireland's consultation paper CP86 dealing with Fund Management Company Effectiveness - Delegate Oversight, PricewaterhouseCoopers agreed to make a tool available to the independent fund director community to respond to CP86 on an anonymous basis.

Using an internet based online tool we reproduced each of the questions in CP86 and provided a text box for the submission of responses to each question. We have also provided space for any opening remarks and also space for any concluding remarks.

In total we received 15 responses via the tool which we attach in Appendix 1. For each responses received we have simply extracted the responses received from the tool and included them in the attached appendix.

Yours faithfully,



Kenneth Owens  
Partner  
PricewaterhouseCoopers

# Appendix 1: Survey responses

## Response 1

Do you have an introductory summary comment which you would like to make in response to the consultation?

No

### Section 1

1.1 Is publishing a delegate oversight good practice document along the attached lines a good approach to encouraging the development of the supervision of delegates by fund management companies?

Yes.

### Section 2

2.1 Is the breakdown of revised managerial functions correct?

Yes - but non-executives should not be doing managerial functions. The references to day to day involvement confuse the role of a manager and director. Were a director to be involved day to day their capacity to provide independent oversight would be much diminished

2.2 Should other managerial functions be provided for?

None.

2.3 What are your observations about what the operational effectiveness function might entail and how this might be performed?

None

2.4 Do you see any obstacles to the Chairperson performing the operational effectiveness function?

see 2.1

### Section 3

3.1 Is relaxing the two Irish resident director requirement the correct approach?

No - it will discourage Irish resident INEDs who have substantial and varied experience and qualification. They have supplemented their previous commercial and professional experience with further training and qualification. If the CBI defines a skill shortage this group will move to fill it/remedy their deficiencies.

3.2 Will relaxing this requirement have an adverse impact on the ability of the Central Bank to have issues with distressed investment funds resolved?

Yes - non-resident directors are less amenable to CBI enquiry and sanction. Leaving a sole Irish resident director will make that person's position within a fund board weakened and isolated.

3.3 If so, how could this be addressed?

*Retain the existing 2 Irish resident director regime.*

*Broaden the intake of INEDs.*

*Diversify the tenure of existing board positions by way of restrictions on engagements.*

**Section 4**

4.1 What are your views on the proposed approach to measuring time spent in Ireland?

*Irish resident director should mean someone the majority of whose working time is spent in Ireland.*

4.2 Can you suggest any alternatives or any enhancements to the definition proposed by the Central Bank?

*Adjust the required days to 160 working days.*

**Section 5**

5.1 Is there a downside to requiring fund management companies to document the rationale for the board composition?

*No.*

5.2 Will fund management companies require a transitional period during which they can alter their board composition to ensure they have sufficient expertise and how long do you consider would be a reasonable timeframe for such adjustments?

*Yes - 6 months.*

**Section 6**

6.1 Are there any other elements which should be included by the Central Bank in a Fund Management Company Effectiveness – Delegate Oversight initiative?

*No.*

**Conclusion**

Do you have concluding remarks which you would like to make on the consultation document?

*No.*

## **Response 2**

Do you have an introductory summary comment which you would like to make in response to the consultation?

*Steps to increase investor protection are to be welcomed. Stronger governance and oversight of funds should result in improved protection for investors. However I have 2 general comments with respect to the paper. The Fund is a product of the Investment Manager/Promoter, focus solely on the structure that delivers the product rather than the product itself and/or promoter in my view leaves a gap. Secondly the term used throughout is delegate. However in my view Funds do not delegate functions but instead outsource them under the terms of commercially entered contracts. There is a large definitional difference between these two terms delegate and outsource.*

### **Section 1**

1.1 Is publishing a delegate oversight good practice document along the attached lines a good approach to encouraging the development of the supervision of delegates by fund management companies?

*Accepting my initial comment on fact that Funds outsource functions rather than delegate them, I think the publishing of good practice document is a good approach.*

### **Section 2**

2.1 Is the breakdown of revised managerial functions correct?

*I think the consolidation of oversight tasks is a positive step as is the inclusion of a more detailed role with respect to distribution.*

2.2 Should other managerial functions be provided for?

*It is unclear to me looking through this where the oversight for the safekeeping of assets resides.*

2.3 What are your observations about what the operational effectiveness function might entail and how this might be performed?

*My understanding is that the term operational effectiveness was included in error and should in fact read organisational effectiveness. This is a collective oversight of the functions that have been outsourced (or indeed retained) and their effective operation. Including overall board effectiveness and management of conflicts of interests also I think appropriately reside here.*

2.4 Do you see any obstacles to the Chairperson performing the operational effectiveness function?

*Again if the term is correctly organisational effectiveness rather than operational effectiveness this likely in my view falls within the collective responsibility of the board under the leadership of the chair.*

### **Section 3**

3.1 Is relaxing the two Irish resident director requirement the correct approach?

*Good governance and oversight of the funds activities (investment, operational etc.) should result in enhanced investor protection. Where a director is resident is not especially relevant to achieving this. Instead it is the individual and collective knowledge and experience base of the board that should be considered. From a good governance viewpoint residency should not be a consideration.*

3.2 Will relaxing this requirement have an adverse impact on the ability of the Central Bank to have issues with distressed investment funds resolved?

*I do think this is a practical issue for the Central Bank. Clearly having Directors that reside in the jurisdiction does in real terms result in the Central Bank being able to carry out its supervisory activities more effectively I would have thought.*

3.3 If so, how could this be addressed?

*To digress I think that the real issue is one of how directors are appointed to fund boards and especially as it relates to current requirement of 2 Irish resident directors. As I note above it is the individual and collective knowledge of the board that needs to be considered. The key functions, the investment management process (including the risk parameters within which this operates, the distribution process, the operational process, asset safeguarding etc. should be capable of being effectively overseen. Directors should have strong experience over one or more of these areas in my view. As someone that has worked in the investment management industry and only recently has engaged with the funds industry it is clear that these are two areas of the finance industry in Ireland that have operated very separately in the past with little or no overlap. Perhaps the director appointment process needs to cast a wider net and encourage more participation by Irish residents that have the relevant investment management experience.*

## **Section 4**

4.1 What are your views on the proposed approach to measuring time spent in Ireland?

*Again as noted above the effectiveness of the board will not be determined by the residency of the board members. However the effectiveness for the Central Bank in practical terms I think may. I also do think that many funds/boards do need to consider tax rules and implications in addition to guidance from the central bank.*

4.2 Can you suggest any alternatives or any enhancements to the definition proposed by the Central Bank?

*I will pass on this.*

## **Section 5**

5.1 Is there a downside to requiring fund management companies to document the rationale for the board composition?

*I do think this will lead to improvements in overall fund governance which should enhance investor protection.*

5.2 Will fund management companies require a transitional period during which they can alter their board composition to ensure they have sufficient expertise and how long do you consider would be a reasonable timeframe for such adjustments?

*I would expect that a board could over a 12 month period effectively transition itself to ensure that it has the range and depth of competencies required to ensure the effective oversight of a fund and its operations.*

## **Section 6**

6.1 Are there any other elements which should be included by the Central Bank in a Fund Management Company Effectiveness – Delegate Oversight initiative?

*I believe it is good that this paper addresses all fund management companies as the introduction of regulations between UCITS and non-UCITS funds in a separate fashion does led in inconsistencies.*

## **Conclusion**

Do you have concluding remarks which you would like to make on the consultation document?

*I think this consultation paper is to be welcomed. I do wonder if the residency issue has been confused with the availability of sufficiently competent resources locally, especially in the area of Investment Management, to serve on boards. However this issue is potentially more an outcome of the director appointment process rather than in fact the availability of sufficiently experienced resources residing in Ireland. Perhaps having independently held registers of individuals with their professional experience and other qualifications would help in this regard.*

## **Response 3**

Do you have an introductory summary comment which you would like to make in response to the consultation?

No response.

### **Section 1**

1.1 Is publishing a delegate oversight good practice document along the attached lines a good approach to encouraging the development of the supervision of delegates by fund management companies?

No response.

### **Section 2**

2.1 Is the breakdown of revised managerial functions correct?

No response.

2.2 Should other managerial functions be provided for?

No response.

2.3 What are your observations about what the operational effectiveness function might entail and how this might be performed?

No response.

2.4 Do you see any obstacles to the Chairperson performing the operational effectiveness function?

No response.

### **Section 3**

3.1 Is relaxing the two Irish resident director requirement the correct approach?

*The CBI's proposal appears to be based on the premise that there is currently a limited pool of suitably qualified candidates for positions as INEDs on funds' boards. Laudably the Central Bank wants to encourage a broad range of relevant skills and competencies on funds' boards but its belief that Irish based competencies in some areas, such as risk management and portfolio management, are scarce is misplaced. Furthermore in the current environment the more real substance a fund can demonstrate the better. ESMA is likely to address this issue soon and the locally based presence of more than one INED would certainly support the case for substance. For this reason too the CBI proposal to relax the residency requirement is a move in the wrong direction.*

3.2 Will relaxing this requirement have an adverse impact on the ability of the Central Bank to have issues with distressed investment funds resolved?

*Yes I believe it would. In distressed situations, having two locally based directors who are readily accessible must be very important to and reassuring for the CBI. Also on the ground availability of resident INEDs will be always of great practical assistance in ensuring the speedy resolution of any major issue that has arisen by, for instance, being available at short notice for urgent meetings with advisors.*

3.3 If so, how could this be addressed?

No response.



## Section 4

### 4.1 What are your views on the proposed approach to measuring time spent in Ireland?

*I have no strong view on this but would question how the CBI can monitor and police a 110 day requirement and if any change is really necessary. At least tax residency has the merit of being objectively assessed.*

### 4.2 Can you suggest any alternatives or any enhancements to the definition proposed by the Central Bank?

*No response.*

## Section 5

### 5.1 Is there a downside to requiring fund management companies to document the rationale for the board composition?

*I cannot see any.*

*Generally I note that the CBI has clarified that it does not have a requirement that a lawyer be one of a fund's INEDs provided that the board has access generally to legal advice. I welcome this clarification. Requiring that an objective process be adopted in selecting board members is good governance practice and could be implemented without creating an additional onerous compliance requirement for fund promoters. Indeed in the long run they are likely to benefit significantly from the diversity it would bring to boardrooms.*

### 5.2 Will fund management companies require a transitional period during which they can alter their board composition to ensure they have sufficient expertise and how long do you consider would be a reasonable timeframe for such adjustments?

*3 years would seem to be a reasonable period.*

## Section 6

### 6.1 Are there any other elements which should be included by the Central Bank in a Fund Management Company Effectiveness – Delegate Oversight initiative?

*No response.*

## Conclusion

### Do you have concluding remarks which you would like to make on the consultation document?

*I believe that CP86 has overlooked a major governance risk inherent in the current funds' INED system. Specifically there is a serious over concentration of directorships among a small circle of people - many of whom have legal backgrounds. Anecdotally there are a number of individuals who hold over 100 funds' INED positions. It is questionable how in normal circumstances it is possible for such individuals to discharge properly their fiduciary duties to the funds under their stewardship but in distressed situations it would seem impossible that they can do so. The reputation risk to the regulator from these situations is obvious. I believe that as it has done in other sectors, the CBI should now consider introducing a limit on the number of funds' directorships that an individual can hold. To avoid market disruption I suggest that this could be implemented over a relatively lengthy timescale.*

*There is already more than enough untapped domestic directorship capacity to meet the new market demand that would arise as a result of introducing a cap. Furthermore this move would encourage more individuals to enter the sector. So we do not believe that even this change would necessitate the mooted relaxation of the Irish residency requirements.*

## **Response 4**

Do you have an introductory summary comment which you would like to make in response to the consultation?

*No response*

### **Section 1**

1.1 Is publishing a delegate oversight good practice document along the attached lines a good approach to encouraging the development of the supervision of delegates by fund management companies?

*I agree that the publication of a good practice document is a good approach.*

### **Section 2**

2.1 Is the breakdown of revised managerial functions correct?

*The streamlining of the delegated functions is a good idea. It might be no harm to have a non- exhaustive longer list of functions that should be covered by the streamlined list.*

2.2 Should other managerial functions be provided for?

*No response*

2.3 What are your observations about what the operational effectiveness function might entail and how this might be performed?

*In my view the organisational/operational effectiveness function as described appears to be more of an executive role.*

2.4 Do you see any obstacles to the Chairperson performing the operational effectiveness function?

*Yes, the role as described in CP86 appears to be more of an executive role. Furthermore this could result in the Chairman becoming less independent of the company.*

### **Section 3**

3.1 Is relaxing the two Irish resident director requirement the correct approach?

*No.*

3.2 Will relaxing this requirement have an adverse impact on the ability of the Central Bank to have issues with distressed investment funds resolved?

*Yes. The Central Bank access to and influence over non-resident directors may be difficult in the case of distressed funds. This may result in reputational damage to the Irish Funds Industry.*

3.3 If so, how could this be addressed?

*CP86 indicates that competencies in some areas can be scarce. It is not clear as to how this perception arises. I would disagree- there are INED candidates with risk management and investment management experience available. The selection process for INEDs could be more transparent. Furthermore a limit on the number of directorships an INED can take on would ensure that the pool is broadened. Furthermore not all skillsets on a board need to come from the INEDs- there should be a balance of relevant skills across the entire Board.*

## **Section 4**

### **4.1 What are your views on the proposed approach to measuring time spent in Ireland?**

*I do not agree with the approach of introducing another test of residency as this would be open to challenge and difficult to enforce. If there is to be a residency test one that is already in operation in this jurisdiction, such as that applied by the Revenue, would be the best approach.*

### **4.2 Can you suggest any alternatives or any enhancements to the definition proposed by the Central Bank?**

*An existing tried and tested approach such as that used by the Revenue would be the best approach. Many promoters wish to ensure that their fund is resident in Ireland for tax purposes, and using the Revenue residency test for Irish directors will assist in this regard.*

## **Section 5**

### **5.1 Is there a downside to requiring fund management companies to document the rationale for the board composition?**

*There shouldn't be a downside; however there is a risk of being over prescriptive which could result in a dysfunctional board.*

### **5.2 Will fund management companies require a transitional period during which they can alter their board composition to ensure they have sufficient expertise and how long do you consider would be a reasonable timeframe for such adjustments?**

*If an adjustment has to be made, 12 months would be a reasonable period of time.*

## **Section 6**

### **6.1 Are there any other elements which should be included by the Central Bank in a Fund Management Company Effectiveness – Delegate Oversight initiative?**

*No response.*

## **Conclusion**

### **Do you have concluding remarks which you would like to make on the consultation document?**

*Consideration should be given to having an industry body for Fund INEDs approved by the Central Bank- the easiest route would be through the IFIA, but to date it has not been possible for INEDs to join the IFIA.*

## **Response 5**

Do you have an introductory summary comment which you would like to make in response to the consultation?

*The Consultation on Fund Management Company Effectiveness – Delegate Oversight is to be welcomed. It is noted that the papers proposed initiatives focuses on both the authorization process through which the quality of the board’s and the company’s internal arrangements for fund management are examined as well as the routine oversight of the company investment.*

*It is noted that the question of the principles applying to the allocation of board responsibilities set out in the IFIA Corporate Governance Code are the subject of another review. Notwithstanding that proposed review, however, it is submitted that an effective response to this CP 86 must consider the independence as well as the robustness of the board’s composition. For UCITS funds, the management of funds and the utilization of a Management Company (“ManCo”) and an investment funds company/trust structure may typically be split between those promoters who incorporate the ManCo within their own corporate structures and those who outsource the management functions of UCITS to third party providers.*

*In both these instances, there may often be found a de minimis approach to board composition, with an Irish resident Director who often is also affiliated with a law firm or service provider to the board and another Irish director. This then is supplemented with a number of executives from the Promoter. While all Directors have obligations with respect to the company and their office, the perception of conflict is real and sits poorly by comparison with governance in other jurisdictions with a requirement towards majority independence de facto or de jure.*

*It is my view that the smaller the promoter the greater the risks are, where a focus on costs means the demands of fund governance and a robust board may be considered a luxury rather than an essential. Regardless of size and scale however, the principle should be applied throughout the industry so that boards are demonstrably and measurably majority independent of the promoter, while critical examination of service provider outputs would be best served by not having their representatives sit on those same boards, as is already the case, correctly, for Custodian and Administrator service providers. While the latter point may increase Management Company costs where third party providers offer ManCo services to promoters, it is ultimately to the benefit of proper fund governance and the investor and avoids a “tick box” approach to fund compliance.*

### **Section 1**

1.1 Is publishing a delegate oversight good practice document along the attached lines a good approach to encouraging the development of the supervision of delegates by fund management companies?

Yes.

### **Section 2**

2.1 Is the breakdown of revised managerial functions correct?

*The publication of the breakdown of revised managerial functions is to be welcomed. The establishment of funds and the business case to support the ManCo is often in the initial stages an exercise mainly directed by the Promoters’ lawyers to expedite a fund being operational and revenue generating. In this regard steps, which involve the Promoter more meaningfully in this aspect of the process from inception, are welcome. To the earlier point a full and robust board whose interests do not necessarily align with the Promoters in tandem, and, whose focus is on the application of the revised managerial functions to a practical reality would, it is submitted, ensure this focus from inception.*

2.2 Should other managerial functions be provided for?

*I agree with the streamlining of the revised managerial process and note it is not intended to be an exhaustive approach thereby allowing other matters for consideration by the board. I am not convinced that the Regulatory*

*Compliance heading captures all elements that a board needs to be cognizant of. With potential impacts to a funds investors ranging from the taxation potential of FATCA to the market infrastructure changes under EMIR a specific attention to legal and regulatory impacts might be helpful – and is indeed part and parcel of a well-run board’s information.*

**2.3 What are your observations about what the operational effectiveness function might entail and how this might be performed?**

*I note this question relates to operational effectiveness. Having regard to the structure of the CP I have assumed it is meant to relate to organizational effectiveness as the two are clearly separate and distinct.*

*The organizational effectiveness proposal presents challenges. Realistically while some may argue this is a role for a CEO type function, reported through the Promoter, it is arguable that this function should be executed by a truly independent director whose objectivity is less likely to be distorted through proximity to the business demands of the Promoter.*

**2.4 Do you see any obstacles to the Chairperson performing the operational effectiveness function?**

*Having regard to the comments above and in particular the “de minimis’ board, the challenges are apparent. Where there is one truly independent director on a board, a role such as this will require a more direct engagement into the day to day operations of the promoter/investment manager. The ability to so engage will require Promoter cooperation, which is best guaranteed through a robust and truly independent board. The current use of language such as “non-executive” to describe board directors who are also employees of the promoter or investment manager is not helpful in allowing investors establish the level of true independent oversight of a board.*

**Section 3**

**3.1 Is relaxing the two Irish resident director requirement the correct approach?**

*Relaxing the two Irish resident requirement is the correct approach and arguments against it – and admittedly in favour of it – may be seen through a prism of self-interest and to preserve the somewhat “closed shop” nature of the appointment of directors. If the stated aim is to encourage a board range of relevant skills then it is logical that the candidate pool be extended to jurisdictions which have an expertise in sectors not Ireland’s forte such as investment management and promoter entities.*

**3.2 Will relaxing this requirement have an adverse impact on the ability of the Central Bank to have issues with distressed investment funds resolved?**

*No. The proposed access requirements of the CBI are practical and pragmatic and in line with the aim to widen the pool of talent available. In reality the requirement will ensure that the pool of independent Directors is typically contained to Ireland and broadly similar time zones especially with respect to the two “resident” directors. This will be increasingly apparent if the CBI do not adopt the day counting approach to residency.*

*Arguments that non-residence will result in a lack of CBI influence over directors, or present difficulties for sole Irish resident directors serve more a “closed shop” agenda than governance reform. Removing the Irish resident requirement would be in line with other significant fund centres approach and as per above should be considered in light of increasing the requirement for the number of truly independent directors on the board rather than arguing that any gaps in expertise in the Irish market can be addressed by appointing directors from the ranks of the Promoter or the Investment Manager.*

*Any suggestion of a non-residency requirement resulting in a less substantial connection with Ireland is erroneous as both the UCITS requirements and taxation considerations ensure real substance in Ireland.*

*Similarly the idea that certain more specialized functions that may be less available in the Irish resident pool can be supplied to the Board by the promoter risks vesting in the Promoter – as a non-independent body – those very skill sets which are essential to fund governance – a point which underscore the need for more*

*qualified and independent persons on the fund and management company boards, which persons may not always be resident in Ireland.*

*Any adverse concerns are best addressed by having the number of independent directors on a board increased rather than focusing on residency.*

### 3.3 If so, how could this be addressed?

*Not applicable.*

## **Section 4**

### 4.1 What are your views on the proposed approach to measuring time spent in Ireland?

*The day counting approach is not very practical. The reality is that the majority of Directors will be Irish resident or have a real and substantial connection with Ireland through presence at board meetings and the requirement to pay income tax on Director income. The dictates of the UCITS Directive, existing CBI Guidance and taxation requirements with respect to Irish located decision making ensure that Management companies have a real and substantial connection with Ireland. The approach of the CBI to the "non-resident director" is practical and should apply evenly but as referenced above the board will be strengthened significantly if true independence is a requirement for at least two board members and preferably a majority of the Board.*

### 4.2 Can you suggest any alternatives or any enhancements to the definition proposed by the Central Bank?

*A suggested alternative approach would be to ask whether a Director is habitually present or resident in the country which would imply a real and substantial presence falling short of taxation residence or the artificial and potentially limiting demand of a day counting approach. This question and the understanding that the individual should be available to the CBI within the timeframes specified would be a matter for the appointing board to become comfortable with.*

*The caveat to this view is that to meet the requirements of the Companies Acts and to satisfy Revenue considerations it may be practical to insist that at least one of the resident directors is also tax resident. It is anticipated that taxation experts may comment further on this point.*

## **Section 5**

### 5.1 Is there a downside to requiring fund management companies to document the rationale for the board composition?

*No. In fact there is a significant upside in that it will focus the board on tailoring the composition of the board to meet the oversight functions with a clear view to the end investor. It is also likely to compel the promoter to consider this aspect more assiduously at fund inception (rather than when the fund has scale) than might otherwise be, as discussed above, and would certainly suggest a move away from the de minimis model of governance.*

### 5.2 Will fund management companies require a transitional period during which they can alter their board composition to ensure they have sufficient expertise and how long do you consider would be a reasonable timeframe for such adjustments?

*A timeframe of a year would appear reasonable to allow an assessment and reconstitution as required while maintaining continuity.*

## **Section 6**

### **6.1 Are there any other elements which should be included by the Central Bank in a Fund Management Company Effectiveness – Delegate Oversight initiative?**

*Comments would be as per above plus a focus on number of directorships concentrated in individuals or through service providers.*

## **Conclusion**

### **Do you have concluding remarks which you would like to make on the consultation document?**

*Real reform will be disruptive of the status quo – if it is truly successful then the need for anonymous submissions on this topic that challenge the somewhat “closed shop” nature of current access will no longer be necessary!*

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## Response 6

Do you have an introductory summary comment which you would like to make in response to the consultation?

*The Consultation Process has been skewed to reviewing the draft as issues albeit it fails to address the key issues and looks to validate the current regulatory framework.*

### Section 1

1.1 Is publishing a delegate oversight good practice document along the attached lines a good approach to encouraging the development of the supervision of delegates by fund management companies?

*No because the supervision of delegates forms part of corporate governance while fund governance is based on Oversight and this is totally ignored in the paper.*

### Section 2

2.1 Is the breakdown of revised managerial functions correct?

*Managerial functions is misleading as noted in 1.1 above and it is easy to define a requirement however the practical implications need to be considered.*

2.2 Should other managerial functions be provided for?

*No.*

2.3 What are your observations about what the operational effectiveness function might entail and how this might be performed?

*What is more critical is to identify a Risk bask framework that could underpin fund governance. Operation effectiveness and Virtual non-executive entities are a contradiction in terms.*

2.4 Do you see any obstacles to the Chairperson performing the operational effectiveness function?

*Not relevant as the role of Fund Governance and therefore that of the board and its Chairperson are meaningless.*

### Section 3

3.1 Is relaxing the two Irish resident director requirement the correct approach?

*Not relevant. The key aspect is independence which is are not within scope of the CP.*

3.2 Will relaxing this requirement have an adverse impact on the ability of the Central Bank to have issues with distressed investment funds resolved?

*Makes no difference.*

3.3 If so, how could this be addressed?

*No response.*

### Section 4

4.1 What are your views on the proposed approach to measuring time spent in Ireland?



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*Irrelevant Governance is about quality and competence not quantification.*

**4.2 Can you suggest any alternatives or any enhancements to the definition proposed by the Central Bank?**

*Not really as it is the wrong approach as part of attempt to make the board more executive in nature.*

**Section 5**

**5.1 Is there a downside to requiring fund management companies to document the rationale for the board composition?**

*No downside but the fund companies would be better served by defining its activities objectives and principles. This would recognise the difference between the different entities.*

**5.2 Will fund management companies require a transitional period during which they can alter their board composition to ensure they have sufficient expertise and how long do you consider would be a reasonable timeframe for such adjustments?**

*It is extremely dangerous to impact of board composition without having established the governance methodology.*

**Section 6**

**6.1 Are there any other elements which should be included by the Central Bank in a Fund Management Company Effectiveness – Delegate Oversight initiative?**

*The key elements not covered are:*

- *Define the activities of different entities*
- *Establish the What as well as the How*
- *Define Independence requirements*
- *Provide glossary of key terms*

**Conclusion**

**Do you have concluding remarks which you would like to make on the consultation document?**

*Effectiveness should equate to increasing investor protection unfortunately the CP 86 by confusing rather than clarifying the Governance requirements dilutes Investor Protection.*

*The objective of CP 86 would appear to be to increase the executive nature of fund boards so as to distract from the obvious weaknesses and challenges of the RENT a MANCO model that is likely to be extended to UCITS with UCITS V.*

## **Response 7**

Do you have an introductory summary comment which you would like to make in response to the consultation?

*No response.*

### **Section 1**

1.1 Is publishing a delegate oversight good practice document along the attached lines a good approach to encouraging the development of the supervision of delegates by fund management companies?

*No response.*

### **Section 2**

2.1 Is the breakdown of revised managerial functions correct?

*No response.*

2.2 Should other managerial functions be provided for?

*No response.*

2.3 What are your observations about what the operational effectiveness function might entail and how this might be performed?

*No response.*

2.4 Do you see any obstacles to the Chairperson performing the operational effectiveness function?

*No response.*

### **Section 3**

3.1 Is relaxing the two Irish resident director requirement the correct approach?

*The question arises as to why the requirement is being relaxed. There is adequate expertise in the Irish market to cater for the specialty requirements. The issue may be how fund promoters get access to this expertise - a panel of suitably qualified directors may assist. My understanding is that if this is implemented, it will be on an exceptional basis only.*

3.2 Will relaxing this requirement have an adverse impact on the ability of the Central Bank to have issues with distressed investment funds resolved?

*More likely to have an adverse impact - yes.*

3.3 If so, how could this be addressed?

*No response.*

### **Section 4**

4.1 What are your views on the proposed approach to measuring time spent in Ireland?

*Very difficult to measure and implement.*

4.2 Can you suggest any alternatives or any enhancements to the definition proposed by the Central Bank?

*No response.*

## **Section 5**

5.1 Is there a downside to requiring fund management companies to document the rationale for the board composition?

*It may be seen as a hassle factor but ultimately it is good governance.*

5.2 Will fund management companies require a transitional period during which they can alter their board composition to ensure they have sufficient expertise and how long do you consider would be a reasonable timeframe for such adjustments?

*Yes - a year.*

## **Section 6**

6.1 Are there any other elements which should be included by the Central Bank in a Fund Management Company Effectiveness – Delegate Oversight initiative?

*No response.*

## **Conclusion**

Do you have concluding remarks which you would like to make on the consultation document?

*I commend the CBI for consulting with the INED community on these matters - hopefully the concerns and feedback can be taken on board.*

## **Response 8**

Do you have an introductory summary comment which you would like to make in response to the consultation?

No response.

### **Section 1**

1.1 Is publishing a delegate oversight good practice document along the attached lines a good approach to encouraging the development of the supervision of delegates by fund management companies?

*As an Independent Director I find this practice document on delegate oversight to be of real relevance. I believe that it should be constantly updated (I would suggest rotating the contributors so as to give a wider industry participation over time). I would support publishing the document as Central Bank guidance.*

### **Section 2**

2.1 Is the breakdown of revised managerial functions correct?

*Yes. The original designations were too many - thereby diluting focus. Furthermore the degree of overlap between them caused confusion and lack of clarity vis a vis accountability and individual responsibility.*

2.2 Should other managerial functions be provided for?

*One can argue about the slicing and dicing but I believe that most issues are covered.*

2.3 What are your observations about what the operational effectiveness function might entail and how this might be performed?

*CP86 lists four areas - adequacy of internal resources, effectiveness of the board, the impact of conflicts of interest, and effectiveness of the designated tasks. The latter three I believe should already be the "bread and butter" of a competent Chairperson. Overseeing the adequacy of internal resources could on the other hand prove to be very difficult to both define and carry out.*

2.4 Do you see any obstacles to the Chairperson performing the operational effectiveness function?

*As an Independent Chairman this is where I have significant concerns. This I believe muddies the water between executive and non-executive roles and seriously compromises the role of Independent Directors. How it would work by "extending that role to the periods between board meetings" would need extensive consideration.*

### **Section 3**

3.1 Is relaxing the two Irish resident director requirement the correct approach?

*I believe not. I say this in the interests of governance and not purely out of self-interest. For example Irish politicians spend much of their time abroad maintaining that Ireland is not a "brass plate" location. With Investment management for the most part being carried out overseas, must governance also now go the same way - and what does this say about substance in Ireland?*

3.2 Will relaxing this requirement have an adverse impact on the ability of the Central Bank to have issues with distressed investment funds resolved?

*Yes. Overseas Directors will simply be less available for consultation with the Central Bank. In extreme cases will simply not make themselves available at all through the invocation of legal obstacles.*

3.3 If so, how could this be addressed?

*By maintaining the status quo.*

**Section 4**

4.1 What are your views on the proposed approach to measuring time spent in Ireland?

*Seem reasonable. How will it be measured? What documentary proof will be required?*

4.2 Can you suggest any alternatives or any enhancements to the definition proposed by the Central Bank?

*No response.*

**Section 5**

5.1 Is there a downside to requiring fund management companies to document the rationale for the board composition?

*No. I would enhance the proposal further and require all fund management companies to provide a rationale for their composition on an annual basis and not just at the time of their authorisation.*

5.2 Will fund management companies require a transitional period during which they can alter their board composition to ensure they have sufficient expertise and how long do you consider would be a reasonable timeframe for such adjustments?

*A transitional is both necessary and desirable. I would suggest 18 months maximum.*

**Section 6**

6.1 Are there any other elements which should be included by the Central Bank in a Fund Management Company Effectiveness – Delegate Oversight initiative?

*No response.*

**Conclusion**

Do you have concluding remarks which you would like to make on the consultation document?

*No response.*

## **Response 9**

Do you have an introductory summary comment which you would like to make in response to the consultation?

### *General Observations*

1. *The financial sector suffered very significant setbacks, particularly in the period 2007-2010, and significant failures in the corporate governance regimes applicable to banks and, to a lesser extent, insurance companies were highlighted. However this has not been true of the regulated investment funds industry, despite all the issues being dealt with, including difficult to value assets, liquidity management, side pockets/redemption gates, treating all investors (those redeeming as well as those remaining in the collective investment schemes) equitably, etc. Given this 'validation' of corporate governance in the regulated funds industry in times of crisis, it is difficult to understand why the Central Bank believes such a radical overhaul of corporate governance, as detailed in CP 86, is now required.*

2. *In assessing the state of health of the corporate governance regime for regulated funds it is also important to ensure that a representative sample/cross-section is chosen in arriving at observations and recommendations. For example, the Central Bank decided unilaterally to set up a committee to advise on best practice for corporate governance in the funds industry and the findings in Appendix 1 seem very appropriate. However it should be noted that 2 members of the Committee are not really known in the regulated funds world and of the remaining 4 all 4 are lawyers. In forming a view on how boards deal in practice with all 10/16 managerial responsibilities, in particular activities such as risk management and investment strategy and performance, it is important to consult with a large number of practitioners who reflect the varied skill sets and industry experience to be typically found on boards and not to be too narrowly focused.*

3. *The corporate governance regime for regulated funds in Ireland has mainly been an oversight model with all servicing outsourced to suitably resourced and expert entities and the board of directors exercising oversight of all outsourced activities, acting in a non-executive capacity. This is not the corporate governance model followed in Luxembourg and CP 86 seems to suggest that the Central Bank now favours permanent resources being allocated to each regulated fund (fund/management company employees or consultants acting as designated persons) or all directors, including the chairman, acting in a (quasi-) executive capacity. This is a radical departure from the current corporate governance regime and this will quite clearly increase significantly the corporate governance costs associated with regulated funds, such costs ultimately being borne by the investor. In view of the earlier comments on how the regulated funds world fared during the financial turmoil of the last 10 years it is important to conduct some sort of impact analysis - matching the perceived benefits of CP 86 with the significant increased costs for a CP 86 regime. The interests of the investor are paramount and any significant changes should be carefully evaluated from an investor perspective.*

### **Section 1**

1.1 Is publishing a delegate oversight good practice document along the attached lines a good approach to encouraging the development of the supervision of delegates by fund management companies?

*Please see general and specific comments on CP 86.*

### **Section 2**

2.1 Is the breakdown of revised managerial functions correct?

*Please see general and specific comments on CP 86.*

2.2 Should other managerial functions be provided for?

*Please see general and specific comments on CP 86.*

2.3 What are your observations about what the operational effectiveness function might entail and how this might be performed?

*Please see general and specific comments on CP 86.*

2.4 Do you see any obstacles to the Chairperson performing the operational effectiveness function?

*Please see general and specific comments on CP 86.*

### **Section 3**

3.1 Is relaxing the two Irish resident director requirement the correct approach?

*Please see general and specific comments on CP 86.*

3.2 Will relaxing this requirement have an adverse impact on the ability of the Central Bank to have issues with distressed investment funds resolved?

*Please see general and specific comments on CP 86.*

3.3 If so, how could this be addressed?

*Please see general and specific comments on CP 86.*

### **Section 4**

4.1 What are your views on the proposed approach to measuring time spent in Ireland?

*Please see general and specific comments on CP 86.*

4.2 Can you suggest any alternatives or any enhancements to the definition proposed by the Central Bank?

*Please see general and specific comments on CP 86.*

### **Section 5**

5.1 Is there a downside to requiring fund management companies to document the rationale for the board composition?

*Please see general and specific comments on CP 86.*

5.2 Will fund management companies require a transitional period during which they can alter their board composition to ensure they have sufficient expertise and how long do you consider would be a reasonable timeframe for such adjustments?

*Please see general and specific comments on CP 86.*

### **Section 6**

6.1 Are there any other elements which should be included by the Central Bank in a Fund Management Company Effectiveness – Delegate Oversight initiative?

*Please see general and specific comments on CP 86.*

## **Conclusion**

Do you have concluding remarks which you would like to make on the consultation document?

*No response*



## **Response 10**

### Do you have an introductory summary comment which you would like to make in response to the consultation?

*I believe that the CP adds to the uncertainty regarding Investor Protection and Good Governance. There is a lack of clarity on the objectives and principles, an inconsistency in the use of terminology, significant omissions of key issues and an "one category" fits all approach.*

*This applies even to the Title as well as the content of the CP. e.g.*

*1. Fund Management Companies cover both corporate and fund entities , are related to the IM and Fund activities and differ in terms of objectives principles activities operating models resources and regulation however they are treated as one generic group .*

*2. Effectiveness is about doing the right thing "the WHAT" whereas efficiency is about doing things right. The CP claims to be focused on the "what" bit deals solely with the "How". Investor Interests are protected by ensuring the parties who execute are accountable to the Fund /Investors.*

*3. A delegate and service provider need to be considered in terms of accountability as well as responsibility. Further the unique position of the promoter /IM needs to be treated separately as they are appointed by the investor through the allocation of capital.*

*4. Oversight is an non-executive methodology that needs to be contrasted with management control and supervision. It relates to qualification to serve rather than implementation.*

*5 The terminology is used inconsistency and there is a need for a glossary to assist with clarity of interpretation .At a minimum the following should be defined Effectiveness Ultimate Responsibility Oversight Supervision Investor Protection Substantive Control Day to Day Principles Accountability Organisational effectiveness Quality Letterbox entity Risk Appetite Comprehensive Toolkit management Company.*

*6 The committee terms of reference sets out good practice in the supervision of delegates whereas the CP is related to the oversight of delegates. In fact the committee goes on to interpret supervision as Oversight and management of tasks that have been delegated. This is not alone confusing but potentially contradictory depending on the nature of the entity to which it applies. Further the principles relate to the 'How" and ignore the 'What". For example the principles relating to Fund Governance which are fundamentally different to Corporate Governance would include Transparency NAV Integrity Compliance and Qualification to Serve.*

*As an example Appendix one would imply that the board of a fund is ultimate responsible for Investment Management and for the actions of the IM which they are deemed to be supervising and controlling. Further it is the relevant designated director that is responsible. So what we are saying is that a director that say is paid € 25 k per annum is ultimate responsible to the investor rather than the IM who is remunerated millions of euros in both annual and performance fees , who is identified as the IM in the prospectus and pitch and on whom the investor undertakes due diligence ?In fact I would suggest that it is the exact opposite in that good governance practice by a fund board should ensure that the IM is liable and accountable for managing the investors' money . If either the regulation or the practice confuses this it may potentially dilute investor protection.*

*7 Appendix 1 sets out a Q&A based approach to good practice whereas oversight by exception should be based on a risk based framework that leverages the executive layers of the Governance. Further the recommendations fail to recognise the unique characteristics of a fund structure .While recommendations set out examples of information that should be gleaned it does not provide any guidance on how the information should be actioned or escalated .Further it does not address what a board needs to do so as to rely of experts and specialists.*

*There are many other inconsistencies but one fundamental relates to risk and in particular the risk appetite. It is the IM and not the board that establishes the risk profile of the fund and it is the investor by subscribing that determines whether this is appropriate and proportionate for their needs. The board responsibility is to ensure it is disclosed and that it should not be materially changed without investor approval.*

*I think it is evident for the above observations that CP 86 lacks clarity on its objectives, is inconsistent in its terminology and has a confused scope. This can only lead to increased uncertainty in interpreting what is required from a robust governance methodology.*

*Further the CP has not dealt with key components of good practice including:-*

- 1. Independence*
- 2 Governance Risk Framework*
- 3. Accountability*
- 4 The Central and Unique Roles of the Promoter and the Investment Manager.*

*The CP fails to recognise and differentiate between the Fund (the Product) and the Investment Manager (Discretionary Manager) and secondly the governance methodology needs not only to address investor protection but all actions of the fund board need to be in the best interests of investors. Finally no practice should ignore the reality and in particular who are the executive players and who get remunerated accordingly.*

*"The IM receives over 85 % of the fund expenditure while the board would receive substantially less than 1%" and therefore can you define Ultimate responsibility in Financial as well as regulatory terms.*

*Aside; I will answer the questions to highlight the inconsistencies!*

## **Section 1**

- 1.1 Is publishing a delegate oversight good practice document along the attached lines a good approach to encouraging the development of the supervision of delegates by fund management companies?

*Oversight and Supervision relate to two different principles of management theory so clearly the approach as outlined in the CP is inconsistent.*

## **Section 2**

- 2.1 Is the breakdown of revised managerial functions correct?

*What is more relevant is to differentiate between executive and non-executive functions and to establish the principles of fund governance. ? The CP does not address the accountability of a designated director nor how they monitor and control the day to day activities. Further the functions should reflect that the fund is an outsourcing vehicle and not an IM entity. The functions should relate to qualifications to serve and transparency rather than execution.*

- 2.2 Should other managerial functions be provided for?

*No but the approach should be restructured to be based on a risk framework that leverages the executive functionality rather than attempting to micro manage by replicating.*

- 2.3 What are your observations about what the operational effectiveness function might entail and how this might be performed?

*The operational model should reflect the activities and principles of investor protection and therefore as recommended cannot be implemented in practice.*

- 2.4 Do you see any obstacles to the Chairperson performing the operational effectiveness function?

*The operational effectiveness of a virtual entity is self-evident and should focus on doing the right thing. The real obstacle is the regulatory framework and guidance which does not clearly define the requirements of good practice ignores accountability and reflects regulatory form over substance.*

### Section 3

#### 3.1 Is relaxing the two Irish resident director requirement the correct approach?

*If the qualifications to serve of a Fund Director are incorrectly defined that the residence of the director is irrelevant. This is further supported by the incorrect premise that IM and Risk management executive skills are critical to good practice.*

#### 3.2 Will relaxing this requirement have an adverse impact on the ability of the Central Bank to have issues with distressed investment funds resolved?

*The reality is that all distress scenarios are managed by the IM / Promoter and again the residence of the director is not relevant. Further most Irish Boards have a majority of IM directors anyway. What is more important is the strength and integrity of the Independent directors.*

#### 3.3 If so, how could this be addressed?

*Are you considering effectiveness or communication with the regulator?*

*It is simple and practical all funds should have a senior member of management from the IM as the point person for the Board and the Regulator. This person may or may not be a board member but should be a PCF. I would be far more comfortable with a senior member of IM accountable rather than a RENT a Manco*

### Section 4

#### 4.1 What are your views on the proposed approach to measuring time spent in Ireland?

*Irrelevant.*

#### 4.2 Can you suggest any alternatives or any enhancements to the definition proposed by the Central Bank?

*Change the focus to qualifications to serve, Integrity and Independence. The criteria are qualitative which cannot be replaced with blunt quantitative measures.*

### Section 5

#### 5.1 Is there a downside to requiring fund management companies to document the rationale for the board composition?

*No but only if they document the objectives and principles of the entity. As noted above there should be a different approach to manco and fund boards. Secondly how do you monitor and or regulate this. It sounds good in theory but like other regulatory requirements it will mainly result in form over substance e.g. F&P.*

#### 5.2 Will fund management companies require a transitional period during which they can alter their board composition to ensure they have sufficient expertise and how long do you consider would be a reasonable timeframe for such adjustments?

*See 5.1*

### Section 6

#### 6.1 Are there any other elements which should be included by the Central Bank in a Fund Management Company Effectiveness – Delegate Oversight initiative?

*The CP lacks credibility as a guidance for a robust independent governance framework and as drafted is more likely to lead to a dilution in Investor Protection.*

*I think a good starting point would be to define the key objectives and principles and secondly to identify proven governance frameworks that are based on industry best practice which underpins Oversight by Exception leveraging a risk methodology.*

## **Conclusion**

### Do you have concluding remarks which you would like to make on the consultation document?

*I think the process should be reviewed in that it is not conducive to INED participation in that INED need to respect the confidentiality of their board roles and given they are appointed as individuals they do not have the luxury of a corporate opinion.*

*I would agree that the topic needs to be addressed but perhaps reflecting on why there are over 2000 UCITS plans that are the same , that were drafted by lawyers based on a regulatory template and do not reflect the real operating model and accountabilities might have validated what are the key issues that need to be addressed.*

## **Response 11**

Do you have an introductory summary comment which you would like to make in response to the consultation?

*I very much welcome the opportunity to engage with the Central bank and hope this represents the beginning of a process which will continue in the years ahead. I recall 2 semi-annual CBI/Directors meeting being proposed as a possible template going forward. I very much hope this happens.*

### **Section 1**

1.1 Is publishing a delegate oversight good practice document along the attached lines a good approach to encouraging the development of the supervision of delegates by fund management companies?

*Yes. It will however require constant updating as both the industry and governance practice evolve. This I believe should involve the participation of a wider section of the Director community so as to get a greater reflection of industry standards and experience.*

### **Section 2**

2.1 Is the breakdown of revised managerial functions correct?

*Yes. One can argue the "slicing and dicing" but most areas and issues are covered. The original managerial functions were difficult to work given their overlapping nature and consequent confusion as regards individual responsibilities.*

2.2 Should other managerial functions be provided for?

*As stated I think most areas are covered. I would however raise a governance concern - how can non-executive directors remain non-executive directors if they are also required to carry out designated functions which require day-to-day responsibilities?*

2.3 What are your observations about what the operational effectiveness function might entail and how this might be performed?

*The effectiveness of the board, the impact of conflicts of interest and the effectiveness of the designation of the retained tasks will already be carried out by any effective Chairperson. The adequacy of internal resources within the authorised entity could however pose significant challenges and muddies the distinction between executive and non-executive roles. Extending the role to periods between board meetings thereby "ensuring day-to-day control" could further compromise the status of non-executive directors.*

2.4 Do you see any obstacles to the Chairperson performing the operational effectiveness function?

*I believe the Chairperson is the obvious choice. But as stated above I also believe that governance could be weakened. The role of an independent non-executive chairperson within the funds industry is critical. Can this be maintained with what are described as "day-to-day control" functions?*

### **Section 3**

3.1 Is relaxing the two Irish resident director requirement the correct approach?

*No. Firstly, the contention that investment and risk management expertise do not exist in Ireland is unproven. There are in fact many people with such a background in these activities. I accept however that this is a matter for the industry to prove. Secondly, on a practical level; say a promoter comes to the Central Bank maintaining that it has searched high and low for a particular competence but cannot find it in Ireland - how is the Central Bank to verify this? Surely this is just an opportunity for promoters to bring on to boards their own professed*

*"independent" associates. A board with this level of promoter influence is surely not good for governance and is certainly not in the interests of investors. Thirdly, Irish politicians and the IDA travel the world telling investors, regulators etc. that Ireland is not a "brass plate" location. Two important elements of fund management are investment management and governance. The great bulk of Irish funds' investment management is carried out off-shore. By shifting governance abroad from Irish to foreign directors, are we in danger of leaving ourselves open to the "brass plate" tag?*

3.2 Will relaxing this requirement have an adverse impact on the ability of the Central Bank to have issues with distressed investment funds resolved?

*Yes. In times of crises the Central Bank might find it difficult to persuade foreign based directors to engage. In extreme cases these directors may well decide to hide behind legal barriers and simply refuse to co-operate. This would be a very difficult position for an Irish based director to take.*

3.3 If so, how could this be addressed?

*Keeping it clear simple. Remaining with the two Irish resident requirement.*

## **Section 4**

4.1 What are your views on the proposed approach to measuring time spent in Ireland?

*No response*

4.2 Can you suggest any alternatives or any enhancements to the definition proposed by the Central Bank?

*No response*

## **Section 5**

5.1 Is there a downside to requiring fund management companies to document the rationale for the board composition?

*No.*

5.2 Will fund management companies require a transitional period during which they can alter their board composition to ensure they have sufficient expertise and how long do you consider would be a reasonable timeframe for such adjustments?

*I feel fund management companies should be required to provide a rationale for the composition of their board on an annual basis and not just at the time of authorisation. An 18 month transition would be adequate as a transition period.*

## **Section 6**

6.1 Are there any other elements which should be included by the Central Bank in a Fund Management Company Effectiveness – Delegate Oversight initiative?

*No response.*

## **Conclusion**

Do you have concluding remarks which you would like to make on the consultation document?

*No response.*

## **Response 12**

Do you have an introductory summary comment which you would like to make in response to the consultation?

*Overall, the publication of CP86 and the follow-on briefing sessions has been positive for the industry. They have facilitated constructive discussions, greater awareness and understanding between the Central Bank and the Irish director community. In my view, the Central Bank don't always appreciate the existing high level of engagement on the part of fund director in the governance of their associated fund companies. I believe that the majority of Irish fund directors are highly professional in the approach to their fund engagements and that the quality and engagement of directors in this fund jurisdiction is second to none. Whilst there are a number of useful discussion points in CP86 I believe that the majority of 'best practices' outlined in Appendix 1 are already undertaken in this market.*

### **Section 1**

1.1 Is publishing a delegate oversight good practice document along the attached lines a good approach to encouraging the development of the supervision of delegates by fund management companies?

*I believe it is a good approach and that it has led to constructive discussion and focus on fund governance and the role of the fund director. This exercise has highlighted a number of challenges and gaps between the Central Bank's expectations of the role and the reality that the fund director faces in practice. I don't believe that CP86 full recognises the dynamic of the director's relationship with the promoter and the nature of the oversight role being 'non-executive' rather than 'day to day' engagement. There are also obvious cost implications associated with CP86 which will add to the ever increasing regulatory costs faced by promoters and potentially impact the cost competitiveness of this jurisdiction*

### **Section 2**

2.1 Is the breakdown of revised managerial functions correct?

*No problem with the breakdown. The various groupings seem sensible.*

2.2 Should other managerial functions be provided for?

*I believe the proposed list is very comprehensive.*

2.3 What are your observations about what the operational effectiveness function might entail and how this might be performed?

*I presumed that this question should refer to 'organisational effectiveness'(rather than 'operational effectiveness') as outlined in the text of CP86. This role (as outlined) would require a very high level of engagement and 'day to day' involvement especially for more complex fund structures with many service providers. As well as the regular board meeting cycle, the oversight challenge would require regular due diligence visits to all service providers and monitoring the performance of all the other designated persons. Again, the emphasis in CP86 Appendix 2 is on the 'day to day' engagement which would seem synonymous with an 'executive' rather than an 'non-executive' role. This would entail an additional costs for the fund company to account for the additional responsibility and time commitment of the designated person fulfilling this role.*

2.4 Do you see any obstacles to the Chairperson performing the operational effectiveness function?

*The obvious obstacle is the chairs willingness to commit the additional time and to be involved on a 'day to day' basis. Might this compromise his/her independence?*

## Section 3

### 3.1 Is relaxing the two Irish resident director requirement the correct approach?

*The introduction of this measures will have minimum impact on the composition of Irish Fund boards. Whilst the residency requirement is largely irrelevant it facilitates the Central Bank access to fund boards at the margin. The argument that this jurisdiction lacks the requisite skill base and that this measure will improve the skill base to Irish boards over time is flawed. There a numerous candidates in this market seeking fund board appointments with the requisite investment and risk management expertise. Apart from the obvious experience/expertise requirement, the fundamental criteria for appointments should be time availability, capacity and independence.*

### 3.2 Will relaxing this requirement have an adverse impact on the ability of the Central Bank to have issues with distressed investment funds resolved?

*Yes. It might prove very challenging to be the only Irish director on the board of a distressed investment fund. Often in these situations the relationship between the board and the promoter/investment manager will deteriorate. True independence of directors and the board are required in these situation. My concern would be that the overseas directors might not always be fully independent of the promoter and may already have close ties with the promoter or sit on their overseas boards. The result would be that the sole Irish director would become isolated and not possessing the requisite information required to resolve the situation. It could also diminish the Irish director influence in resolving the distressed situation to the benefit of all shareholders.*

### 3.3 If so, how could this be addressed?

*The best approach to guarantee the Central Bank's influence in distressed situations would be to focus on genuine independence on board rather than residency requirements. In distressed situations the interests of the Central Bank and that of a genuinely independent board will tend to be aligned.*

## Section 4

### 4.1 What are your views on the proposed approach to measuring time spent in Ireland?

*No response.*

### 4.2 Can you suggest any alternatives or any enhancements to the definition proposed by the Central Bank?

*No response.*

## Section 5

### 5.1 Is there a downside to requiring fund management companies to document the rationale for the board composition?

*No. This makes sense and would be of great assistance when replacing existing directors and making appointments to boards. Achieving the right blend of relevant experience and skills on a fund board is important and can only benefit the quality of discussion and decision making at board level. There are a number of factors that would need to be addressed in this process:*

*1. Attention should also be given to the softer elements like personality fit, willingness to challenge, team focus etc. These elements are obviously subjective and therefore, more difficult to document and can make a significant contribution to the dynamics of the board.*

*2. The required skill base may become too prescriptive and needs to consider the size of the board and the complexity of the fund complex.*



3. *The cost / benefit analysis of this exercise would need to be considered.*

4. *Other considerations when documenting the rationale for board composition should be previous working experience as a fund director, training, time/capacity available and independence.*

5.2 Will fund management companies require a transitional period during which they can alter their board composition to ensure they have sufficient expertise and how long do you consider would be a reasonable timeframe for such adjustments?

*The assumption here is that existing boards don't have an adequate balance of expertise and skills and that board composition has not been considered to date. This is not necessarily true as board composition has received considerable attention, albeit in a less formal manner, in the past. The majority of boards have the correct balance of hard and soft skills as currently constituted and therefore, don't require any change.*

*Obviously, some boards require changes to improve their overall effectiveness and will need a transitional period.*

*Making new appointments to add an additional skill or expertise to a board is relatively straightforward. Resignation of existing board members can be more complex and may require additional time. The existing composition of the board may be best handled as part of a full formal board review as required by the fund governance code. The effectiveness and impact of formal reviews can be improved when handled by external consultants. Such external reviews can obviously be expensive and may not be appropriate for all boards. As such, it is difficult to define the length of the required transitional period as every board will have different variables.*

## **Section 6**

6.1 Are there any other elements which should be included by the Central Bank in a Fund Management Company Effectiveness – Delegate Oversight initiative?

*No response*

## **Conclusion**

Do you have concluding remarks which you would like to make on the consultation document?

*No response*

## **Response 13**

Do you have an introductory summary comment which you would like to make in response to the consultation?

No.

### **Section 1**

1.1 Is publishing a delegate oversight good practice document along the attached lines a good approach to encouraging the development of the supervision of delegates by fund management companies?

*In principle yes although it would be important that, if published by the Central Bank, supervisors overseeing governance by schemes would not apply the good practice document in a prescriptive or strict "check the box" approach but would have regard to the scale and complexity of the particular scheme concerned and the totality of the governance model in place. Application of a "check the box" approach by the Central Bank could result in a "check the box" approach being adopted by schemes rather than a considered approach to governance and supervision of delegates.*

### **Section 2**

2.1 Is the breakdown of revised managerial functions correct?

*The consolidation of managerial functions is desirable and welcome in that it should eliminate certain overlaps between some functions which has given rise to a lack of clarity in the parameters of the roles concerned (e.g. accounting policies and procedures and the potential for overlap with financial control). However introduction of such a change will necessitate changes to existing business models with related time and expenditure costs. As acknowledged by the Central Bank, transitional arrangements would be essential. A minimum period of two years would be desirable for funds and management companies already authorised to allow for planning and implementation of these changes.*

*The references in Appendix 2 to "day-to-day" should be clarified. For the most part the descriptions of the roles of the Designated Persons relate to "monitoring", "assessing", "escalating" i.e. overseeing the work of others rather than necessarily "doing" that work. The extent of monitoring, assessment and oversight depends on the nature and scale of the scheme concerned and therefore may not be necessary on a "daily" basis as suggested by the references "day-to-day".*

2.2 Should other managerial functions be provided for?

No. The list suggested is comprehensive.

2.3 What are your observations about what the operational effectiveness function might entail and how this might be performed?

*Responsibility for "operational effectiveness" as this term is described and elaborated in CP 86, in particular in Appendix 2, appears to equate the role of Chair to that of a CEO or Managing Director, i.e. an executive/ quasi-executive rather than a non-executive role and as such is not an appropriate role for the Chair of a fund/ fund management board which to date has been a non-executive function. To require the Chair to undertake this role could compromise the individual's independence and ability to objectively consider issues arising and lead appropriate actions in their resolution. An alternative which could be considered would be an operational effectiveness committee. However this should not be an absolute requirement and it should be open to a board to determine how best operational effectiveness is achieved, resourced and overseen, having regard to the nature scale and complexity of the scheme concerned.*

2.4 Do you see any obstacles to the Chairperson performing the operational effectiveness function?

Please see response to 2.3.

## Section 3

### 3.1 Is relaxing the two Irish resident director requirement the correct approach?

No, for the reasons given below:

1 CP86 identified two problems with the current Irish residency requirements which it proposes to address by the proposed relaxation of the existing rules. However it is questionable if the issues identified are in fact industry problems and if the concerns noted can be addressed by other means:

(a) CP 86 states the lack of a definition of residence calls the residence requirement into question - this proposition is questionable as is the proposed definition. The absence of a definition has not been the subject of industry debate or concern and is universally understood as referring to tax residence. The introduction of a 110 day definition is arbitrary, has no foundation in current legal or tax or regulatory rules or practices and will require record keeping and monitoring; in contrast tax residence rules are clear and understood and are meaningful and consistent with a substantive governance framework in Ireland. It would be helpful to understand what has prompted the Central Bank's proposal in this regard, given the absence of debate or general industry concern on this issue.

(b) CP 86 notes the Central Bank's concern to encourage a broad range of skills and competencies on fund boards and that the current requirements could unduly limit the pool of individuals with risk and portfolio management experience available for director appointments. It notes a possible relative scarcity in certain competencies e.g. risk management. Diversity in the composition of a board is critical to a board's effective functioning and a range of skill sets is desirable rather than focusing on one or two to the exclusion of others. It is considered that concerns as to the limited pool of directors with risk and portfolio management skill sets and scarcity of certain competencies are ill founded for the following reasons:

-the residency requirement does not preclude the appointment of directors from any jurisdiction with portfolio and risk management expertise. The introduction of a requirement to assess board skill sets and composition would itself address any possible shortcomings in these skills on boards.

- Ireland has a long established investment management industry and history of collective investment expertise. There is an extensive pool of personnel with direct executive experience in this industry who are available for appointment to fund boards.

If the Central Bank has concerns regarding skills and qualifications, it is open to the Bank to prescribe ongoing professional training for directors as, for example, is the practice of the FCA in the UK with respect to controlled functions.

2 Such a relaxation would be contrary to the international trend of requiring substance in the domicile of a regulated fund. A relaxation of the current rules potentially puts Irish funds sold internationally at risk of criticism and / or refusal by regulatory authorities in other jurisdictions of authorisation to distribute due to lack of substance in the home domicile.

3 Such a relaxation could potentially unintentionally adversely affect the independent oversight of Irish funds as increasingly in recent years the requirement for two Irish resident directors has in practice meant the appointment of two independent directors (i.e. independent of any delegate/adviser of the fund and the custodian). The developing practice for appointment of independent directors is a welcome trend and reflective of international best practice (as advocated by IOSCO following extensive consultation with international industry bodies and recommended by ESMA in its final advice on UCITS V) and demands of investors who increasingly query the independence of oversight and express preference for a majority of independent board members.

*The absence of independence requirements for funds is inconsistent with requirements for other Irish regulated entities. For example the statutory Corporate Governance codes for the banking and insurance sectors require a majority of independent non-executive directors (except in the case of subsidiaries which must have at least three independent non-executive directors in the case of "major" institutions and two in the case of "non-major" institutions).*

*It is submitted that a more appropriate focus would be on the importance of the independence of a certain number of directors on fund boards rather than residence criteria. It is recommended that the Central Bank would introduce a minimum independent non-executive director requirement coupled with a clear definition of independence rather than leaving the definition and interpretation of the concept of independence to individual boards.*

*4. It is not desirable to be prescriptive about one or more required skill sets at board level whether with respect to investment / risk management expertise or other specific skills sets which may be considered necessary or desirable in the composition of a fund board, such as finance, operations, compliance or regulatory expertise. However while it is important that each board member has a particular competence or skill, perhaps equally if not more important is that each and every board member has, as demonstrated through their respective career experiences, leadership skills. These include the ability to manage, oversee, communicate, lead, constructively challenge and influence and to work as a member of a team in considering and making collective decisions.*

**3.2 Will relaxing this requirement have an adverse impact on the ability of the Central Bank to have issues with distressed investment funds resolved?**

*Yes. In the event of distressed situations it is possible to foresee situations where non-Irish resident directors will not be as accessible or responsive to regulatory enquiries or demands, potentially placing an inappropriate burden on a single individual who may be the sole Irish resident director. Practically non-resident directors will not be as familiar with Irish legislation, regulation or practice or developing trends in Ireland. Having two Irish resident directors on boards significantly strengthens oversight of Irish legal and regulatory matters and the potential for engagement with the Central Bank in the event of issues arising.*

**3.3 If so, how could this be addressed?**

*Re-introduction of the promoter requirement for Irish funds or review of the role of the Trustee with respect to distressed funds.*

## **Section 4**

**4.1 What are your views on the proposed approach to measuring time spent in Ireland?**

*The introduction of a 110 day definition has no foundation in current legal or tax or regulatory rules or practices and will require record keeping and monitoring; in contrast tax residence rules are clear and understood and are meaningful and consistent with a substantive governance framework in Ireland. It would be helpful to understand what has prompted the Central Bank's proposal in this regard, given the absence of debate or general industry concern on this issue. It is difficult to see what benefit would be obtained from such a requirement and how that would be reconciled with the increased record keeping / monitoring burden.*

**4.2 Can you suggest any alternatives or any enhancements to the definition proposed by the Central Bank?**

*A practical alternative would be to explicitly refer to tax residence as the means by which residence is determined.*

## Section 5

### 5.1 Is there a downside to requiring fund management companies to document the rationale for the board composition?

*No major downside envisaged.*

### 5.2 Will fund management companies require a transitional period during which they can alter their board composition to ensure they have sufficient expertise and how long do you consider would be a reasonable timeframe for such adjustments?

*Many companies may not require alteration of board composition. A transitional period of 18 months to two years would appear reasonable for those that do.*

## Section 6

### 6.1 Are there any other elements which should be included by the Central Bank in a Fund Management Company Effectiveness – Delegate Oversight initiative?

*1 The paper should address independence requirements for directors. The absence of defined independence requirements for fund boards and fund management company boards is surprising and not reflective of international trends, best practice or recommendations of IOSCO and ESMA and is worthy of further consideration. Moreover the absence of independence requirements for funds is inconsistent with minimum independence requirements for other Irish regulated entities.*

*It is recommended that the Central Bank would introduce a minimum independent non-executive director requirement coupled with a clear definition of independence rather than leaving the definition and interpretation of the concept of independence to individual boards.*

*2 Linked to the concept of independence is the distinction which should be drawn between executive and non-executive roles. The vast majority of fund directors are currently non-executive in that they are not employed by the fund (albeit some directors may be employees of the relevant fund group). The designation of specific "managerial" functions equates the relevant functions to executive/ quasi- executive roles and blurs the distinction between the executive and the non-executive director where such functions are assumed by a director. This raises the question as to whether designated persons who have assumed responsibility for a "management function" (or oversight of a management function) can be considered to be independent, particularly in the context of objectively resolving any issues which may arise.*

## Conclusion

### Do you have concluding remarks which you would like to make on the consultation document?

*No response.*

## **Response 14**

### Do you have an introductory summary comment which you would like to make in response to the consultation?

#### *General Observations*

1. *The financial sector suffered very significant setbacks, particularly in the period 2007-2010, and significant failures in the corporate governance regimes applicable to banks and, to a lesser extent, insurance companies were highlighted. However this has not been true of the regulated investment funds industry, despite all the issues being dealt with, including difficult to value assets, liquidity management, side pockets/redemption gates, treating all investors (those redeeming as well as those remaining in the collective investment schemes) equitably, etc. Given this 'validation' of corporate governance in the regulated funds industry in times of crisis, it is difficult to understand why the Central Bank believes such a radical overhaul of corporate governance, as detailed in CP 86, is now required.*

2. *In assessing the state of health of the corporate governance regime for regulated funds it is also important to ensure that a representative sample/cross-section is chosen in arriving at observations and recommendations. For example, the Central Bank decided unilaterally to set up a committee to advise on best practice for corporate governance in the funds industry and the findings in Appendix 1 seem very appropriate. However it should be noted that 2 members of the Committee are not really known in the regulated funds world and of the remaining 4 all 4 are lawyers. In forming a view on how boards deal in practice with all 10/16 managerial responsibilities, in particular activities such as risk management and investment strategy and performance, it is important to consult with a large number of practitioners who reflect the varied skill sets and industry experience to be typically found on boards and not to be too narrowly focused.*

3. *The corporate governance regime for regulated funds in Ireland has mainly been an oversight model with all servicing outsourced to suitably resourced and expert entities and the board of directors exercising oversight of all outsourced activities, acting in a non-executive capacity. This is not the corporate governance model followed in Luxembourg and CP 86 seems to suggest that the Central Bank now favours permanent resources being allocated to each regulated fund (fund/management company employees or consultants acting as designated persons) or all directors, including the chairman, acting in a (quasi-) executive capacity. This is a radical departure from the current corporate governance regime and this will quite clearly increase significantly the corporate governance costs associated with regulated funds, such costs ultimately being borne by the investor. In view of the earlier comments on how the regulated funds world fared during the financial turmoil of the last 10 years it is important to consider some sort of impact analysis - matching the perceived benefits of CP 86 with the significant increased costs for a CP 86 regime. The interests of the investor are paramount and any significant changes should be carefully evaluated from an investor perspective.*

#### **Section 1**

##### 1.1 Is publishing a delegate oversight good practice document along the attached lines a good approach to encouraging the development of the supervision of delegates by fund management companies?

*A good practice document which is seen as a reference point can make sense. Much of what appears in Appendix 1 is appropriate. However it is important that all parties, particularly the Central Bank, do not view the good practice document as prescriptive and quasi-mandatory (for example the 'voluntary' Corporate Governance Code). Good practice evolves and 1 size does not fit all.*

## Section 2

### 2.1 Is the breakdown of revised managerial functions correct?

*Please see the specific closing comments in respect of collective responsibility. Arriving at a set of revised managerial functions should not be a key consideration and, given the huge amounts of time and cost associated with the Programmes of Activity (some of which remain to be approved) further work now in this area is highly impractical and not a benefit to the investor, in whose interests all parties, including the Central Bank, should act.*

### 2.2 Should other managerial functions be provided for?

*No obvious omissions but we need to be careful about being too prescriptive in terms of managerial functions and good corporate governance.*

### 2.3 What are your observations about what the operational effectiveness function might entail and how this might be performed?

*We should not over-engineer the regulated fund product. Investors invest because they can gain access to a particular promoter/investment manager through a regulated collective investment scheme. Investors also take comfort from the domicile of the fund and the exercise of strong corporate governance. The investors are most concerned about performance, the operational effectiveness of the investment manager, and experienced boards will continue to evaluate operational effectiveness through their review of the quarterly board papers requested from the various service providers and delegates.*

### 2.4 Do you see any obstacles to the Chairperson performing the operational effectiveness function?

*Please see the specific closing comments. The Board bears collective responsibility and the entire Board, guided by the Chairman can assess operational/organisational effectiveness through their thorough review and questioning of the quarterly board papers from the services providers and delegates. We should avoid at all costs the Chairman assuming a quasi-executive role.*

## Section 3

### 3.1 Is relaxing the two Irish resident director requirement the correct approach?

*Please see specific closing comments. Very hard to understand why there is any interest in changing a rule which has served our industry so well.*

### 3.2 Will relaxing this requirement have an adverse impact on the ability of the Central Bank to have issues with distressed investment funds resolved?

*Yes. Irish resident directors are committed to Ireland (hence they live here) and are very conscious of the need to work in partnership with everyone, including the Central Bank, to preserve and enhance the reputation of Ireland. We are a tiny country on the periphery of Europe and it is very hard to believe that directors, with limited time being spent in Ireland, will see the reputation of Ireland as a priority or indeed will prioritise getting in contact with the Central Bank when crises arise.*

### 3.3 If so, how could this be addressed?

*Leave the rule as is. If there is any evidence that the director talent pool is becoming depleted or that there is a skills shortage then the issue can be re-visited. However with the strong and increasing interest in corporate governance and the increasing numbers of professionals, with vastly different backgrounds and skills, seeking to be directors it is hard to envisage a shortage of suitably qualified or experienced director candidates.*

## Section 4

### 4.1 What are your views on the proposed approach to measuring time spent in Ireland?

*This measure makes no sense and will prove to be impractical to police and enforce. There is no need to revisit the requirement for 2 Irish resident directors but should this issue arise in the future then the well accepted tax residence definition should be accepted and this is rigidly policed already.*

### 4.2 Can you suggest any alternatives or any enhancements to the definition proposed by the Central Bank?

*If the Central Bank has an interest in exploring Irish residency for corporate governance purposes then it should simply adopt the tax definition already being used and accepted by all.*

## Section 5

### 5.1 Is there a downside to requiring fund management companies to document the rationale for the board?

*Yes if the guidelines become overly prescriptive and quasi-mandatory. Please also see closing specific comments for consideration of some of the 'softer', more qualitative considerations for board composition.*

### 5.2 Will fund management companies require a transitional period during which they can alter their board composition to ensure they have sufficient expertise and how long do you consider would be a reasonable timeframe for such adjustments?

*CP 86 does not refer enough to the interests of the investor which presumably is the core consideration for all parties and, in particular, the Central Bank. If there are abuses or major deficiencies are identified then changes should be introduced immediately. If there is no objective evidence (please see the opening, general comments in respect of reaching conclusions based on a non-representative sample/cross-section) that there are no major issues to be addressed then change, if required at all, should be gradual and should not result in significant cost or disruption to the Board. The extent of the deficiency identified for the Board in question should dictate how quickly action is taken and is difficult to be too prescriptive.*

## Section 6

### 6.1 Are there any other elements which should be included by the Central Bank in a Fund Management Company Effectiveness – Delegate Oversight initiative?

*Please see the opening general comments reflecting on how well the regulated funds corporate governance regime has served the industry and, in particular, the investor. It is puzzling why the Central Bank should now try to significantly overhaul such a tried and tested system.*

## Conclusion

### Do you have concluding remarks which you would like to make on the consultation document?

*Specific Comments*

4. (li):

*a. Company law in Ireland clearly establishes the collective responsibility of the entire board for corporate governance, the directors assuming collective, as well as individual, responsibility. There is no uncertainty as to who is accountable and in discharging their responsibilities it is implicit that there is significant overlap between directors in reviewing the affairs of the company and exercising effective oversight. As a result it is difficult to understand the following statements: 'It has become clear that there is significant overlap between these*



*different tasks. This could create a risk that accountability in relation to a matter could be in doubt because of excessive oversight between different designated tasks.’ The designated director can act as the focus point for related fund reports and Central Bank queries but the entire board remains responsible and accountable and must ensure that the board is entirely conversant with such matters, irrespective of who the designated director may be. Because of this shared accountability overlap is both desirable and necessary. To adopt any other approach would be to pursue a ‘silo’ style of corporate governance and to deny the collective wisdom of the board being available for the benefit of the investor.*

*b. A very practical consideration has to be whether it is in the best interests of the investor to mandate that all business plans and programmes of activity be re-engineered at this stage to streamline the managerial functions for which the board is collectively responsible. If the rationale is to clarify accountability and minimise overlap then this logic seems flawed as outlined above. Looking at this, as we should, from the perspective of the investor, will any marginal benefits achieved outweigh the very significant additional time and costs likely to be incurred?*

*5. (iii): in view of the earlier comments on the robustness of the corporate governance regime for regulated funds, particularly during the financial turmoil, it is hard to understand why the Central Bank is now suggesting that the 2 Irish resident director regime, which has served the industry so well, be disapplied. It is largely irrelevant whether this measure will be availed of in practice or not (possibly due to adverse tax consequences) or the theoretical merits of a bigger talent pool to choose directors from. The reality is that the director talent pool in Ireland is very significant and becoming bigger, with significant expertise in investment strategy, distribution and risk management as well as the core legal and accounting disciplines. There does not appear to be any evidence that there is a skills shortage in Ireland although quite clearly those with the greater skills and experience will always be in greatest demand. The process should continue to be self-regulated, with the final arbiter being the Central Bank. The latter is clearly empowered to deny authorisation for a director, who, in the estimation of the Central Bank, does not have sufficient capacity or appropriate (complementary) skills to act as director of a new fund. To introduce a new corporate governance residence rule (110 days) is simply not practical, as indeed is the 24 hour Central Bank engagement rule for non-residents.*

*6. (iv): under the Fitness & Probity regime a director cannot act as a director of a regulated fund unless the appointment is approved by the Central Bank. If the Central Bank does not accept the recommendation of a board in respect of a new director it can, and indeed should, with-hold approval. If the Central Bank, subsequently believes that a board does not comprise the appropriate mix of skills then it can also with-hold approval when existing directors of existing boards re-affirm their adherence to the Fitness & Probity regime on an annual basis. Boards act responsibly and will not recommend a new director unless they believe such an individual will enhance corporate governance. However opinions can differ and the Central Bank already has the authority to act if it is not satisfied. In determining the appropriate composition of a board a number of factors have to be borne in mind. For example, achieving independence at the expense of industry relevant experience is not generally desirable. Equally, focusing too much on the technical/professional qualifications on a board without recognizing the need for strong industry and corporate governance skills, as well as the personal characteristics of self-confidence and strong interpersonal skills, can be dangerous. There is often a very good reason why many ‘well qualified’ accountants, lawyers, investment managers, diploma holders, etc. are not elected to boards.*

*7. Appendix 2: the description of the managerial functions to be assumed by the designated persons, as outlined in Appendix 2, suggests an ‘executive’ role with its repeated reference to day-to-day involvement (as is also referred to in the body of CP 86). If, for the smaller funds, it is uneconomic to have fund/management company employees or consultants assuming these designated person roles, then quite clearly the Central Bank is advocating that the directors take on these ‘executive’ roles. The ‘devil is always in the detail’ but the real value of an experienced board is the independence and oversight which it brings to corporate governance, ensuring that all the key functions are delegated to suitably qualified persons/entities with adequate resources and exercising effective oversight in managing that delegation. Effective corporate governance director oversight is NOT day-to-day supervision and directors who assume a day-to-day supervisory role simply cannot exercise appropriate detached, independent and objective oversight – the directors themselves have become part of the operational/control process they bear ultimate responsibility for. CP 86 is silent on whether directors, including the chairman, are executive or not. Appendix 2 suggests that the Central Bank favours ‘executive’*

*directors, including an 'executive' chairman, the latter being contrary to most commentators' view of the role of chairman. If we look to the example of the United States, great value is attached to the independence and objectivity of the board, which is inconsistent with directors and the chairman assuming day-to-day supervisory roles.*

## **Response 15**

Do you have an introductory summary comment which you would like to make in response to the consultation?

*In the observations below, the term “Sponsor” means the manager / investment manager of a fund who is also the promoter or sponsor of the fund i.e. the driving force behind the establishment of the fund.*

### **Section 1**

1.1 Is publishing a delegate oversight good practice document along the attached lines a good approach to encouraging the development of the supervision of delegates by fund management companies?

*Yes, subject to the caveat that any “good practice statement” issued or endorsed by the CBI should acknowledge that directors, much like auditors, are “watch-dogs” but not “bloodhounds” and are entitled to assume that delegates are honest, and to rely upon their representations, provided the director exercises reasonable care in the selection and oversight of such delegate.*

### **Section 2**

2.1 Is the breakdown of revised managerial functions correct?

*There is logic in streamlining the designated management functions, but this should not prejudice the discretion of the board to break these functions down further depending on the composition of skill sets and experience on the board.*

2.2 Should other managerial functions be provided for?

*See 2.1 above.*

2.3 What are your observations about what the operational effectiveness function might entail and how this might be performed?

*In terms of the first perceived weaknesses in the oversight functions referred to in CP 86, I would disagree that distribution strategy requires monitoring outside the quarterly board meetings. By definition, distribution “strategy” is set at the outset of a fund’s launch as it is an integral part of the appraisal on the viability of the fund and the target investor market to seed and sustain the fund as a viable entity. The “strategy” may evolve over time but that is unlikely to occur frequently and, accordingly, it is more than sufficient to address distribution strategy, investor dependencies and future capital raising and projected inflows and outflows at the quarterly board meetings. It is most certainly not a “day-to-day” function for a director.*

*In terms of the second perceived weaknesses in the oversight functions referred to in CP 86, and the introduction of an “organisational effectiveness oversight” function for the chairperson of the board or otherwise, this is really going beyond what one would reasonably expect of a non-executive director of an investment fund or fund management company.*

*It is true that effective oversight of delegates suggests or requires periodic on-site review meetings with the delegates where the director responsible for the function has the opportunity to enquire on a range of matters at the heart of the services being provided by the delegate and to meet key personnel engaged in the provision of such services. This is sound practice. It is also true that a chairperson, in order to ensure the effective operation of the board, should be in communication with the delegates and other directors from time to time on matters arising out of board meetings or on any matters arising on a review meeting. However, CP 86 seems to go further than that and assumes that the chairperson is in fact an “executive” director. This is disproportionate to what is required to properly discharge the function and the market will not pay the level of fees required to support one or more “executive directors”. It goes beyond what investors seek or expect and it is likely that the concomitant increase in directors’ fees which would be required to assume these “executive” responsibilities would not be welcome by, or best serve, investors.*

*In general, the tenor of CP 86 implies that the directors in general, and the chairperson in particular, assume “executive” functions of a type which, one might contend, are inappropriate and disproportionate to the board of an investment fund where there are no employees of the fund and where the model is based on the outsourcing of all operating activities and services. The responsibility of the board is to ensure that there is a sound governance framework with appropriate policies, procedures and reporting to enable the board exercise its fiduciary duties including oversight of delegates. CP 86 goes beyond that.*

2.4 Do you see any obstacles to the Chairperson performing the operational effectiveness function?

*Yes. Please see response to 2.3 above.*

### **Section 3**

3.1 Is relaxing the two Irish resident director requirement the correct approach?

*No. Why change the current rule? This requirement has been perceived as an advantage for Ireland in terms of local substance and accountability and to change or dilute the rule would be perceived negatively by investors and would reduce the leverage of the CBI in dealing efficiently with distressed investment funds or with funds where material issues arise.*

*If the CBI is of a view that there is a shortage of appropriate skills then this in itself is not a reason to change the Irish resident requirement. In practice, the Sponsor selects the initial board with a view to ensuring that investor expectations, in terms of board composition, are met. The board can subsequently appoint directors from any country to fill any perceived skill shortage. In general, this is what occurs in practice and it is market or investor led.*

3.2 Will relaxing this requirement have an adverse impact on the ability of the Central Bank to have issues with distressed investment funds resolved?

*Yes. Please see response to 3.1 above.*

3.3 If so, how could this be addressed?

*Please see response to 3.1 above.*

### **Section 4**

4.1 What are your views on the proposed approach to measuring time spent in Ireland?

*It seems unnecessary to seek to have a “definition” of Irish resident or to link this to a tax definition which can be problematic and subject to change or judicial interpretation.*

*If there is to be an attempt to define the term “Irish resident”, the key test should not be the number of days in Ireland (which is an arbitrary number and bears no logical relationship to the role of the director) but availability to attend board meetings in Ireland, meet delegates and services providers such as the fund’s auditors in Ireland and attend any CBI meetings on reasonable notice.*

*The CP 86 proposal would be cumbersome and expensive to implement and monitor and would impose additional and unnecessary requirements (record keeping and reporting) on already overburdened directors, with concomitant increased fees for the funds without any investor benefit, and additional and unnecessary administrative burden and costs on the CBI (monitoring and record keeping).*

4.2 Can you suggest any alternatives or any enhancements to the definition proposed by the Central Bank?

*Please see response to 4.1 above.*

## Section 5

### 5.1 Is there a downside to requiring fund management companies to document the rationale for the board composition?

*Board composition is an important matter and the CBI's attention to this matter is to be welcomed. There is no downside to requiring a fund or fund management company to document the rationale for the board composition.*

*On a separate but very important note concerning board composition, it is most surprising to read the CBI's comments on page 7 of CP 86 to the effect that where a fund management company or fund "has a contract for the provision of legal services, it does not also have to ensure that the board itself also includes legal expertise."*

*There are sound grounds for precluding lawyers from the firm providing such legal services (or lawyers who have left such firm within the immediately preceding five years or so) from serving on the board as such individuals cannot be truly independent and this compromises the effectiveness of the board as a whole.*

*However, in all other respects, there are very sound reasons as to why the boards of all funds and fund management companies should include a lawyer with relevant experience on their boards. This in accordance with well-established practice in the United States, the world's most developed asset management industry, and for good reason – the board of a fund must be capable of acting independently and challenging all of its delegates and service providers, including fund counsel.*

*Moreover, the importance of having an independent lawyer on the board of a fund is particularly true in the case of funds regulated by the CBI where the Sponsor decides which law firm to retain as legal counsel for the fund. The result is that the law firm regards the "Sponsor" as its real client and works to secure future business from such Sponsor. This is evident where issues concerning the investment management of a fund are commonly addressed between the Sponsor and the relevant law firm prior to, or sometimes without reference to, the board of the fund. This is a fact of how the market in Ireland works and, accordingly, it is imperative that the board actually does have a director who is a lawyer with relevant experience and who is independent of the law firm appointed by the Sponsor to act for the fund. Without such independence the board has no inherent ability to assess or challenge the law firm or the Sponsor on issues where the law firm concerned is compromised due to an inherent commercial bias to support the Sponsor.*

*An additional factor which supports the importance of having an independent lawyer on the board of a fund is that many of the fund directors are commonly "introduced" or "recommended" by the relevant law firm appointed by the fund Sponsor and therefore may be inhibited or compromised from challenging such legal counsel or the fund Sponsor. In these circumstances their "independence" is compromised as they wish to secure future board appointments from the relevant law firm.*

### 5.2 Will fund management companies require a transitional period during which they can alter their board composition to ensure they have sufficient expertise and how long do you consider would be a reasonable timeframe for such adjustments?

*Yes. 6 to 12 months.*

## Section 6

### 6.1 Are there any other elements which should be included by the Central Bank in a Fund Management Company Effectiveness – Delegate Oversight initiative?

Yes. Please see response to 5.1 above and following observations:-

(i)

*One matter of continuing concern is the requirement and practice in Ireland for boards to have only one truly independent director. This is a real weakness in the governance framework as the dynamics for a lone dissenting independent director can be difficult, especially at the time when it matters most to protect investors i.e. when there is a difference in opinion between the independent director and the non-independent directors on the board aligned to the Sponsor or who have other commercial arrangements with the Fund or the Sponsor. This may be acute in times of market stress where, for example, the Sponsor may press for a gating or suspension of redemptions or otherwise from time to time when issues arise in relation to the investment management of the fund.*

*It would better serve investors to require that each board contain two truly independent directors.*

*In this regard any individual who is a director, officer, employee of, or consultant to, any firm or company providing services (such as, but not limited to, business consulting, legal, compliance, accounting, administration, risk management, corporate secretarial services, MLRO services or the provision of designated personnel etc.) to the fund, fund management company or investment manager cannot not, under any measure, be regarded as “independent”.*

(ii)

*Another fundamental weakness in the current system rests in the relationship between a director and the Sponsor. A practice has developed in Ireland where directors service agreements are short term allowing for summary termination or termination on short notice (90 days). This is driven by legal counsel advising the Sponsor with a mind-set that the director is to be treated like an employee of the Sponsor whereas in law the director is an officer of the fund owing his/her duties to the shareholders rather than the Sponsor. The difficulty is that one could conceive that the short notice may temper or affect the posture or actions of a director on matters where the Sponsor has an opposing view. This is not in the best interests of investors.*

*It would better facilitate real independence, and therefore be preferable from an investor protection perspective, if director service agreements have minimum terms (e.g. three years), without prejudice to the fund’s right to terminate immediately for breach or wrongdoing by a director or where the director has been disqualified by law or by the CBI from serving as a director.*

## Conclusion

### Do you have concluding remarks which you would like to make on the consultation document?

*One noticeable deficiency in CP 86 is the absence of any focus on “independence” which goes to the heart of the effective operation of a board to protect investors’ interests. Please see comments at responses 5.1 and 6.1 above which speak to the importance of “independence” and the correct skill and experience sets to have on any fund board.*