



**TISA Exchange Limited**

# **BRIEFING NOTE: TISA EXCHANGE CONTRACT CLUB**

December 2017

This note is intended to explain the contract club and the key provisions of the contract club documents, based on the types of questions raised by members and prospective members. It is not intended to be a substitute for parties reviewing the terms of the Membership Agreement and taking individual advice on the obligations created by membership of TISA Exchange Limited.

## A. SUMMARY AND BACKGROUND

The Tax Incentivised Savings Association (TISA), in collaboration with representatives of the financial services industry and assisted by Pinsent Masons LLP, established TISA Exchange Limited (TeX), an industry 'contract club' to facilitate the electronic transfer and re-registration of assets.

The electronic transfer process is facilitated by the use of:

- (a) a standard legal contract that manages the risks and liabilities associated with electronic asset transfer and re-registration. The standard legal contract was produced and agreed by a Legal Working Group made up of representatives (legal and operational) from fund managers, service providers and platforms. This group took into account feedback provided by other interested parties, such as technology providers; and
- (b) an industry-agreed Service Level Agreement (SLA). The SLA is the product of a cross-industry initiative to agree the standards and service levels for the electronic re-registration of assets.

One of the key objectives of the club is to support quick and compliant platform to platform re-registration using ISO 20022 messages, driven by the FCA requirement that all platforms must offer timely in specie re-registration.

However, this is not the only objective of the club, and the business process and message set cover the transfer of any tax wrapper, as well as instructions relating to the transfer of cash: the contract club is relevant whatever is being transferred.

Further information on the contract club and the background to the project can be found at <http://www.tisa.uk.com/tex.html>

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## 1. THE 'CONTRACT CLUB'

### 1.1 What is the 'contract club'?

Conceptually, the contract club was set up to allow asset managers and platforms to carry out electronic portfolio transfers without having to put in place numerous individual agreements between them. Since the club was set up, its scope has been extended to cover pension transfers and include pension providers and scheme administrators.

Legally, the club is a not-for-profit organisation named TISA Exchange Limited (TeX). It has been set up as a company limited by guarantee (and not by shares). This means that club participants will be "members" of - rather than shareholders in - TeX. The Articles of Association provide that any assets of TeX on liquidation will be shared between those firms who are members on the date of dissolution of TeX.

The day-to-day operation of the club is outsourced by TeX to a third party service provider, SWIFT.

➤ *Diagram 1 gives an overview of the contract club structure*

### 1.2 Why has the club been set up in this way?

We have used a corporate structure for the club because it provides a tried and tested governance framework, allowing club participants to be represented at membership and board level. The structure enables each member to participate in the management of the contract club (through its membership of TeX and/or through the directors nominated by its membership category) and ensure that the contract club is not run solely by, and for the benefit of, one section of the industry or larger players.

Also, using a corporate structure for the club allows the creation of a series of bilateral relationships:

- between TeX and each member; and
- between one member and each other member. This avoids the need to put in place hundreds of individual bilateral agreements between members, whilst allowing a member to take action directly against another member without TeX acting as middleman.

Finally, by using a company limited by guarantee, the members' exposure to any liabilities of TeX is limited to £1.

### 1.3 Couldn't the objectives have been achieved without needing to set up a club?

We did consider whether to make standard terms available in the form of a side letter that counterparties would sign alongside their existing commercial agreements, instead of creating a club. The problem is that a standard letter of variation cannot take account of different existing arrangements and there is a risk of liability gaps if arrangements do not mesh properly. Also, every party would need to sign multiple side letters and if there was a change in law or regulation each of the side letters would need to be updated.

TISA consulted on this, and the industry agreed with TISA's conclusions: the only way to achieve an industry standard approach to electronic asset transfers and make this process workable for the industry was to have an industry standard agreement that was signed by all parties and maintained as part of a 'contract club'.

1.4 **The approach effectively “hard wires” the structure in to all of the arrangements between the parties – what happens if the club is terminated?**

Members contract with each other as well as with TeX, so the existing member-to-member parts of the arrangement could survive; some amendment to the terms would be needed if there was no TeX, as the terms are based on there being a central body (ie TeX) to administer the club. Without the existence of TeX, however, it becomes harder to construct a scenario where new members can contract with each other member, as there is no TeX to act as agent for members when they are signing up.

The structure of the arrangement was a fundamental point, and the pros and cons of the contract club (compared to having just a series of bilateral agreements between platforms and asset managers) were presented to the industry and considered at an earlier stage in the legal workstream. There has been majority support for this contract club; the FCA has been reviewing TeX's progress and we are committed to making the club a success.

1.5 **Do firms have to become a member of the club?**

There is no requirement to join the club in order to carry out electronic transfers, but the purpose of the club is to make the process of transfers between members quicker and easier. If you are a member, you can deal with all other members on the same terms without having to sign additional agreements (although many counterparties may have separate commercial agreements). Please see some of the other benefits to joining the club, as outlined in question 1.6.

If you want to participate in the contract club, you must become a member. The board of TeX may invite non-members to take part in an Advisory Council or working group (see question 5.1), or as associates of the club, but only members will have a say in how the club is run.

1.6 **What are the main benefits of joining the club?**

The main benefit is that you only have to sign up to one contract. As outlined for question 1.2, becoming a member creates a direct contractual relationship between you and each other member. This saves the huge costs and significant time involved in negotiating a contract with each other relevant nominee, asset manager and platform provider.

The other key benefits are:

- ***You are signing up to a set of industry standard terms:*** you have certainty that transfers are taking place between members on the same terms and each member has the same position on risk and liability. Only members of the club will be party to the terms. Also, if changes to the law or regulatory requirements impact on the terms of the Membership Agreement, changes only need to be made once, rather than having to be re-negotiated with each participant.
- ***You can publicise that you are a member of TeX:*** the creation of the contract club shows that the industry is taking the re-registration issue seriously, and your membership shows that you have committed to meeting the industry-agreed standards, to benefit consumers.
- ***You will have a say in the running of the club now and in the future:*** the club will be extensible to other areas and it provides a forum for the industry to address future issues affecting the industry. If the scope of the club is extended to cover future industry issues, again members will benefit from one set of terms governing a uniform approach.



- ***You can rely on the dispute resolution process:*** this aims to facilitate the quick resolution of disputes without recourse to the Courts, and if there is a consumer claim arising from a transfer, you have the right to see the audit trail of the other members involved in the transfer and request their assistance in determining where an issue arose.

#### 1.7 **Does the club create competition issues?**

In itself, no, but we have to acknowledge that many members of the contract club will be competitors and the contract club will involve co-operation between competitors to make the transfer process quicker and easier (albeit the primary goal is to benefit end clients). We do need to avoid the risk of anti-competitive practices being carried out under the auspices of the contract club, and this is the purpose of the Competition Policy. Amongst other things, the Competition Policy specifies that the club will not be used as a way to share certain commercially sensitive information or enter into anti-competitive arrangements.

The Competition Policy forms part of the Membership Agreement and each member will be contractually bound to comply with it. Associates are not a party to the Membership Agreement, but they are subject to the terms of their letter of appointment, which includes an obligation to comply with the Competition Policy. Each member and associate still has individual legal obligations not to take part in anti-competitive conduct, and compliance with the Competition Policy will not relieve a member or an associate from any breach of competition law.

In support of the Competition Policy, for each meeting that TeX organises:

- TeX circulates an agenda in advance and the agenda contains a statement about competition and about confidentiality. At the start of each meeting a TeX representative or the Chairperson or Deputy Chair draws the attendees' attention to these statements;
- minutes of the meeting are produced by TeX and circulated after each meeting; and
- the venue is rotated around the offices of TeX members and our external lawyers. The external lawyers are part of and attend the Legal Advisory Council meetings, and attend other meetings from time to time (see clause 3 of the competition policy).

#### 1.8 **What is the difference between the purposes in clauses 2.3.1 and 2.3.2 of the Competition Policy?**

Clause 2.3.1 deals with information that may be shared between organisations as part of the individual transfers, whereas clause 2.3.2 is to ensure that information about a member that is learned through taking part in the operation of the contract club (eg attending member meetings or through taking part in any Advisory Council or working groups or through seeing the minutes or outputs to / inputs from a TeX meeting) can only be used for participation in the operation of the club and furtherance of the purposes of the club. Clause 2.3 is integral in seeking to strike a balance between the pro-competitive effects of the club and mitigating the risk of an exchange of commercially sensitive information as between competitors.

#### 1.9 **Will I have to deal with other members if I join the club, even those I don't have a commercial relationship with?**

No. TeX will carry out a certain level of due diligence on applicants (see question 3.8) but each member may have additional due diligence requirements that have to be satisfied before it can transact with another member with whom it has no existing relationship, or there may be other reasons why it does not want to transact with a particular member within the scope of

TeX. This will be based on that party's own risk assessment and any concerns it has about a particular counterparty.

If a member did receive an instruction (or a request to do business under TeX) from a member with whom it had no existing relationship, it could:

- (a) elect to carry out due diligence on the other member, in which case it is not required to comply with the Contract Terms and service levels unless and until the due diligence has been completed to its satisfaction, or
- (b) deal with the transfer instruction outside the scope of TeX. In this case, the relevant parties do not have to comply with the service levels or messages standards or other obligations in the Contract Terms that relate to 'Participants'. However, any 'Member' obligations in the Contract Terms will still apply (such as the undertaking from Members only to make legitimate requests for data about a Customer).

## 2. SCOPE OF THE CLUB

### 2.1 What is the scope of the contract club?

The objectives of TeX, as set out in the Articles of Association, are:

- (a) *To facilitate portfolio transfers and the re-registration of assets:* The objects do not specify the types of transfer to which the contract club applies and do not limit the types of transfer covered by the contract club. In practice, however, the Service Level Agreement describes the portfolio transfer and re-registration scenarios to which the service levels apply from time to time: this will determine what transfers are covered by the terms of the Membership Agreement at any point in time.
- (b) *To operate the "contract club":* This includes the management of admissions and departures from the club, collection and application of fees, and provision of support services to club participants (such as proposing changes to the Membership Agreement to keep it up to date with changes to law and regulation); and
- (c) *To undertake any other matters which are reasonably ancillary to (a) and (b).*

The Contract Terms have been kept as generic as possible, to make it easier to extend the contract club to further products without the terms needing to be re-written. However, if any particular product type will change the risk profile under the Contract Terms and introduce additional risks, the terms may need to be amended to take account of these risks or legislation and regulation particular to the products. By way of example, since TeX was set up the scope of the club has been extended to include pension products and certain changes were required to the Contract Terms to ensure alignment with pension legislation.

### 2.2 Can the club's scope be changed at any time, and what if I no longer want to take part?

The objects of the company could be extended beyond portfolio transfers and re-registration if 75% of the membership agreed to that (changes to the Articles of Association require 75% approval). While we have tried to future-proof the Membership Agreement as far as we can, we cannot foresee all scenarios. It is likely that if the scope of the club was to change fundamentally, the By-laws, Contract Terms and other documents would need to be amended, so a scope change it is not something that could be done without the members' involvement.

There is no provision for members to opt-out of any extended scope, but any member who was unhappy with the changes could resign from the club. Any changes would need to be

notified in advance; if a number of members indicated they would leave the club as a result of the scope change, a solution would need to be found at the time.

### 2.3 What transfers are covered by the contract club?

As mentioned for question 2.1, the Articles and By-laws themselves do not specify or limit the types of transfer covered by the contract club. There is a generic definition of a "Transfer" in the Membership Agreement that: (i) does not limit the jurisdiction in which a fund can be constituted or whether the fund is regulated or unregulated, (ii) extends to cash transfers and composite transfers, (iii) may involve the conversion of units into different share classes if necessary for the transfer, and (iv) does not exclude foreign-domiciled funds. While the Articles and By-laws are intended to be generic, it is the Service Level Agreement (SLA) that defines the scope of transfers covered.

The SLA describes the portfolio transfer and re-registration scenarios to which the service levels apply from time to time, and the SLA will determine what transfers are covered by the terms of the Membership Agreement at any point in time. The in-scope transfer scenarios currently provided for in the SLA are based on the scenarios in the UKFMPG's market practice guidance for the interpretation and use of ISO 20022 messages for investment portfolio and fund transfers, and the SLA needs to be read in conjunction with the UKFMPG's guidance. The adoption of UKFMPG standards is subject to period review and approval by TeX members, and the versions of the UKFMPG standards that apply to transfers between TeX members from time to time will be listed on the TeX website<sup>1</sup>.

### 2.4 Do all members have to deal electronically?

No. It has been considered whether the contract club should be restricted to those who use electronic messages, but it was concluded that the club should be open to those who will continue to communicate manually. This position may change in the future. A service level grace period was in operation until 1 July 2013, however, all club members now have to comply with the service levels whether operating electronically or manually; this is expected to encourage members to migrate to electronic messaging but there is no compulsion to do so. One reason for giving the lengthy grace period was to give members time to set up their systems and processes to allow them to comply with the service levels (eg integrate electronic messages with their back office system).

### 2.5 How will I know if a member is dealing manually or electronically - will I have to check with each member?

No. It will state on the register of members whether the member will be able to communicate electronically or only manually. As not all members will be able to send and receive messages electronically, at least initially, other members will need to be able to deal with them manually.

## 3. MEMBERSHIP

### 3.1 Who can become a member?

The current categories of member are:

- **TISA** (*the Tax Incentivised Savings Association*): TISA is the founding member of TeX, having been involved in the creation of the club.
- **Asset Manager**: any firm that is ultimately responsible for the maintenance of a fund's register of unit holders and repurchase of units that are to be redeemed can become an 'Asset Manager Member'.

<sup>1</sup> Section 2.2 of the SLA

- **Service Provider:** any firm that is an:
  - (i) ISA manager;
  - (ii) a platform service provider (in each case as defined in the FCA Handbook from time to time);
  - (iii) falls within the definition of 'product provider' in the FCA Handbook (other than any firm that falls within paragraph (iii) of that definition<sup>2</sup> (ie asset managers) or paragraph (iv) of that definition (operator of a personal pension scheme or stakeholder pension scheme)); or
  - (iv) intermediate unitholder (as defined in the FCA Handbook).
- **Pension Provider:** any firm that is responsible for the provision and administration of a pension scheme established in the UK or, if one is appointed for the relevant pension scheme, the pension administrator.
- **Multi-role:** any firm that meets the criteria for more than one category of member (eg both a 'Service Provider Member' and an 'Asset Manager Member') and will act in either capacity depending on the particular transfer scenario must join as a 'Multi-Role Member'. This category is only relevant where one legal entity performs more than one role. For example, if a firm meets the criteria for both an 'Asset Manager Member' and 'Service Provider Member' and will act in the role of an asset manager or service provider depending on the transfer scenario, it will be a 'Multi-Role Member'. If different entities within the same corporate group perform different roles, then each of those entities must join as a member in the relevant member class.

There may be other categories of member in the future, as determined by the board from time to time.

### 3.2 Where do the third party administrators and technology providers fit in to the club?

Currently, unless a party falls within the category of asset manager, service provider, pension provider (which, as defined, includes a pension administrator appointed in respect of the pension scheme) or multi-role member it cannot become a member of the contract club. Other interested parties (such as technology providers) can participate in TeX by becoming an associate (see question 3.12), but they do not become members of TeX and they will not be a party to the Membership Agreement.

As far as the Membership Agreement is concerned, technology providers and third party administrators will be the agents or sub-contractors of members, and each member will remain liable for the performance of its obligations by any agent or sub-contractor on its behalf. A member will have failed to comply with its obligations if its agent or sub-contractor has failed to create and send messages in accordance with the standards or comply with the timescales in the SLA.

### 3.3 Is membership restricted to UK firms?

No. A firm can become a member if it is established anywhere in the EEA and is regulated or recognised (as applicable) by the FCA.

The documents of the club are governed by English law and have been drafted under English law. Any disputes will be submitted to the jurisdiction of the English court and members

<sup>2</sup> "(iii) the operator of a regulated collective investment scheme or an investment trust savings scheme"

based outside the UK will need to appoint an agent for service in the UK (although please note that all members will be subject to the dispute resolution procedure, which aims to resolve disputes without having to go to court).

#### 3.4 **Is there a need for a multi-role member category?**

Yes, we believe there is a need for this. There are single entities that perform the role of both an asset manager and service provider. The Membership Agreement must apply to the member in whichever capacity it is acting; therefore, if multi-role entities are not recognised as a separate class of member, a firm fulfilling both roles would need to become both a service provider member and an asset manager member of TeX and would have a right to vote in each category.

As additional categories of membership are created over time, the "multi-role member" category may become more significant.

#### 3.5 **How do I become a member?**

Each firm that wants to become a member must complete and return the TeX registration form (and a joining fee form, if the fee has not already been paid by another company in the applicant's group). Each applicant must meet the eligibility criteria, which includes the due diligence. The board will consider every application. On acceptance of the application by the board, the applicant is admitted as a member of TeX and:

- (a) the joining fee becomes due and payable, unless the joining fee has already been paid by another entity in the applicant's corporate group - only one joining fee is payable per corporate group; and
- (b) the first annual membership fee becomes due and payable. Only one annual membership fee is payable per category of member within a marketing group (eg if you have a marketing group that has two asset manager members and one service provider member, only two annual membership fees are payable). If the applicant is part of a marketing group and another firm from the marketing group (in the same category of membership) has already paid the full annual membership fee, then no annual membership fee is payable.

To retain membership, the annual membership fee must be paid in respect of each member. The 'Notes to the Contract Club Joining Fee Form and Registration Form' give further information on the fees and completing the application forms.

#### 3.6 **Do I have to nominate one individual to be my relationship manager, which means I have to update TeX every time that person changes?**

You do not need to nominate one individual and the responsibility could be shared by several individuals. What is important is that TeX has a clear point of contact with you and that the email address you provide for the relationship manager (whether an individual's email address or a shared mail box) is checked regularly, because that is the email address to which TeX will be sending notices eg notice of another member leaving the club, notice of your membership being suspended, notice of changes to the club documents.

Also, if you designate your relationship manager as your first tier for escalation of disputes, any email communications about a dispute will be sent to that email address as well.

If you do give us an individual's email address and the individual leaves your firm, then you will need to provide us with new contact details to ensure that you receive all notices and other member communications from TeX and that the register of members has up-to-date contact information for all members.

### 3.7 **How does a corporate group sign up for membership?**

Each entity within the group must apply to become a member (whether a service provider, asset manager, pension provider or multi-role member) in its own right. The multi-role membership is **not** a default category of membership for groups; however, there may be an entity within the group that performs the role of more than one category (eg both an asset manager and service provider) and therefore will sign up as a multi-role member.

Only one joining fee is payable per corporate group. Within a corporate group, the annual membership fee is payable per category of members in a marketing group (ie one annual membership fee for all the asset manager members in a marketing group, plus one fee for all the service provider members etc).

### 3.8 **What due diligence will TeX be doing on applicants?**

TeX will check only that the applicant:

- (a) is established in the EEA; and
- (b) is authorised or recognised (if established outside the UK) by the FCA; and
- (c) has the necessary FCA permissions for its role.

For applicants to the pension provider member category who are pension administrators for UK pension schemes but are not FCA regulated, the firm is required to provide details of membership of any alternative body or affiliations, a reference from the Chairman of the trustees of any scheme for which applicant acts as administrator and written confirmation from the HMRC that HMRC has not reason to believe the applicant is not a fit and proper person to be a scheme administrator (under the terms of the Finance Act 2004). Amongst other things, this is to guard against pensions liberators / scams. TeX may conduct additional checks and require the applicant to provide additional information to confirm that it meets the TeX criteria for a pension provider member.

When TeX was established there was a lot of discussion about the extent of due diligence that TeX should carry out, including whether TeX should undertake financial and technical due diligence on applicants. It was concluded that if TeX had to carry out extensive financial due diligence that could increase the running costs to members and create barriers to joining the club, which is undesirable when the main object of the club is to facilitate electronic re-registration amongst as many market players as possible. A member is entitled to carry out additional due diligence on another member where it has no pre-existing commercial relationship with that counter-party and its internal policies require additional due diligence to be satisfied.

As there is no requirement currently for members to send and receive data electronically, it was decided that there is no need for TeX to carry out technical due diligence on applicants.

While TeX will carry out the due diligence on an applicant at the point of joining, each member has an on-going obligation to notify TeX of any change in its circumstances that means it no longer meets the membership criteria and ceases to be eligible as a member (eg it loses its FCA authorisation). Also, a member must notify TeX if it becomes aware of those changes in another member. The Whistle-Blowing Policy outlines the circumstances in which a member has to report its concerns about another member.

### 3.9 **What is the legal effect of becoming a member of TeX?**

In applying for membership, each applicant:

- (a) undertakes to TeX and each other member of the club from time to time to be bound by all of the terms of the Membership Agreement. See question 4.1 for the different documents that make up "the Membership Agreement"; and
- (b) appoints TeX as its agent for the purpose of (and for this purpose only) agreeing the terms of the Membership Agreement with all other members from time to time. The appointment is irrevocable for so long as the applicant participates in the contract club.

When a firm is accepted as a member, a direct contractual relationship (governed by the terms of the Membership Agreement) is created:

- (a) between that member and TeX, allowing the member to enforce the terms of the Membership Agreement against TeX; and
- (b) between that member and each other member. This means that the terms of the Membership Agreement can be enforced directly between members if there is a dispute; members will not enforce compliance through TeX. It is most likely that a member will look to enforce the Contract Terms against another member, as that is the part of the Membership Agreement that sets out the obligations and liability of parties in relation to transfers.

The contractual relationship is created as follows:

- (1) The Articles of Association will automatically create the necessary contract between the company (TeX) and each member, and between each of the members amongst themselves, under the Companies Act 2006.
- (2) The other documents that make up the Membership Agreement will not (because they are not part of the Articles of Association) automatically bind every member under the Companies Act 2006. Each applicant will therefore agree these terms with TeX and appoint TeX as its agent to:
  - (i) make an offer on behalf of the applicant to each other club member from time to time to comply with the arrangements set out in the club documents; this offer should remain open for so long as the applicant participates in the club;
  - (ii) accept on behalf of the applicant the offer made by TeX on behalf of each other club member from time to time (whilst the applicant participates in the club) to comply with the arrangements set out in the club documents; and
  - (iii) agree on behalf of the applicant with each other contract club member from time to time any changes made to any of the contract club arrangements outside the Articles of Association which do not require the member's express consent.

This appointment of TeX as each member's agent is included in the registration form, so this appointment is included in an agreement which is not itself dependent upon the agency appointment to take effect. The appointment of TeX as agent is irrevocable whilst the member participates in the contract club.

The Articles of Association provide that membership is a personal right, not a property right, and therefore incapable of transfer to another party. If a member transfers all of its relevant business to another entity it will cease to be eligible to be a member of TeX. The transferee must apply to become a member of TeX in the usual way.

### 3.10 How will I know who the other members are?

This information is set out in the TeX register of members, which is accessible online through the secure member area on the TeX website.

### 3.11 Will we have to keep checking the register of members to see who new members are or to see if someone has left the club?

No. TeX will notify members when new members are admitted to the club, when a member has its membership suspended, and when a member leaves the club (whether it resigns or has its membership suspended). Notices will be sent by email to each member, which is why it is important that members provide a contact email address (or email addresses) that will be monitored.

### 3.12 Who are associates and what rights does an associate have?

Associates are not members of TeX; they are firms that are appointed as an "Associate" of TeX at the discretion of the TeX board and on signing a letter of appointment. Associates include interested parties in the re-registration process, such as technology or standards providers and third party administrators to asset managers and platforms.

Associates do not become party to the terms of the Membership Agreement, and therefore do not have the same rights as members. For example, they do not have the right to appoint directors or vote on any matters which are to be determined by a vote of the membership.

Under the terms of the associate letter of appointment, associates will be able to:

- (a) participate in an Advisory Council or working group(s) (see question 5.1);
- (b) access the secure 'member-only' area of the TeX website, including the register of members;
- (c) attend and speak (but not vote) at the TeX AGM and any extraordinary general meetings of TeX members. They may also be invited to attend and speak at other member meetings.

The benefits granted to an associate are subject to the associate's compliance with its obligations under its letter of appointment.

## 4. THE MEMBERSHIP AGREEMENT

### 4.1 What makes up the "Membership Agreement"?

The following documents, together with the joining fee and registration forms, make up "the Membership Agreement" that each member will enter into with TeX and each other member. These documents are listed in the order of precedence:

- (1) **Competition Policy:** members will have to comply with the competition policy to ensure that no anti-competitive conduct is carried out under the auspices of the contract club. The policy deals with such things as the conduct of board meetings, meetings of the Advisory Council and any working groups, and member meetings. Compliance with this policy will not relieve any member, or TeX, of its individual legal obligations not to engage in anti-competitive conduct. Associates are also bound by the Competition Policy through the terms of their side letter with TeX.
- (2) **Articles of Association:** the articles deal with basic membership issues and governance and objects of TeX. It is a public document (available at Companies House) on which third parties rely.



- (3) **Contract Terms:** this document is the contractual framework for transfers and it deals with the interaction between members in their capacity as participants in an individual transfer. The contract terms set out the key responsibilities and liabilities of a member when taking part in a transfer scenario.
- (4) **By-laws:** these are the standard terms that apply to every member (eg intellectual property rights, change control, dispute resolution). While the Contract Terms contain specific obligations that apply according to the role a member plays in a transfer, the by-laws apply to every member.
- (5) **Glossary:** this is the glossary of defined terms used in the other contract documents. As the Articles of Association is a public document and needs to be self-contained, terms are also defined within that document.
- (6) **Service Level Agreement (SLA):** this is the service level agreement that was produced and agreed by an industry working group and it sets out the service levels (ie the agreed response and turnaround times for re-registration) and the standards that will apply to messages sent between members. The SLA incorporates by reference the UKFMPG's market practice guidance for the interpretation and use of ISO 20022 messages for investment portfolio and fund transfers (as updated from time to time). Part A of the SLA sets out the service levels and standards and is binding on members, while Part B sets out non-binding guidance notes. The SLA is maintained by the TeX SLA & Operational Advisory Council.
- (7) **Whistle-Blowing Policy:** this sets out the circumstances in which a member will report its concerns about a member to TeX. It mirrors the provisions of the By-laws relating to notification of "Relevant Circumstances" to TeX. Note that: (i) this does not replace members' legal and regulatory obligations to report matters to, for example, the FCA, the Serious Fraud Office or to other authorities, and (ii) this does not require a member to disclose anything that would place it in breach of law and regulations (eg provisions against 'tipping off' in respect of suspicious transaction reporting).
- (8) **Privacy Policy:** this deals with TeX's use of personal data collected through the operation of the contract club (eg any personal data collected on the application form or obtained in the course of providing the club services about the relationship manager or the individuals who are your 1st and 2nd tier escalation levels). Data protection provisions in relation to customer data, as opposed to member data, are contained in the By-laws.

#### 4.2 What if I don't like any of the provisions in the Membership Agreement?

The terms of these documents are non-negotiable and applicants will be required to accept these terms 'as is' if they want to become a member of TeX. One of our objectives is to maintain a visible standard across the industry, which cannot be achieved if individual participants are able to negotiate different terms. With this in mind, the terms were produced, debated and agreed by a Legal Working Group made up of representatives from asset managers and platforms, to ensure that the terms were balanced. The Legal Working Group also took into account feedback provided by other interested parties.

Once you become a member, terms can be changed through the change control procedure, and it will be open to members to recommend changes to the TeX board (or to an Advisory Council or working group set up for this purpose) for consideration.

#### 4.3 Do all of the terms apply to TeX and every member?

No. Where rights and obligations apply to:

- (a) a "**Party**", they apply to each member and to TeX;
- (b) a "**Member**", they apply to members only and not to TeX – this is mostly the case in the Contract Terms; and
- (c) a "**Participant**", they apply to a member when it is involved in a transfer.

#### 4.4 What terms apply to the associates?

Associates do not sign up to the same terms as the members of TeX. To become an associate, an organisation enters into a standard associate letter of appointment with TeX and that letter sets out the terms that apply to the associate. The main obligations of an associate are:

- (a) to pay the joining fee and annual associate fee;
- (b) to comply with the Competition Policy; and
- (c) obligations of confidentiality in relation to the confidential information of members and other associates. There is an Associate Privacy Policy that applies to TeX's use of any personal data supplied by associates.

The benefits granted to an associate (see question 3.12) are subject to the associate's compliance with its obligations under the letter. A material breach by the associate (eg failure to comply with the Competition Policy) would give TeX the right to terminate the associate's letter of appointment with immediate effect. TeX also has the right to terminate the letter of appointment at any time for any reason, but where this does not arise from any fault on the part of the associate the firm will continue to have rights as an associate until the end of that year of associateship.

#### 4.5 What happens to existing commercial agreements that members already have in place?

Existing agreements (and any future agreements) will be superseded but only to the extent that they deal with electronic and manual re-registration. For example, if you have agreed service levels for re-registration that are of a lower standard than the service levels in the SLA, they will be superseded by the service levels in the SLA – if you have agreed better service levels, those will be unaffected. Any commercial arrangements will continue to apply, such as the payment of any fees between the parties in relation to a transfer.

#### 4.6 How can the Membership Agreement be changed?

The TeX board will set up Advisory Councils and working groups or groups as needed from time to time to consider changes and make proposals to the board. Members will be entitled to propose changes. It is expected that changes will generally be aggregated and implemented once each year, except in respect of the SLA, which is likely to be updated more frequently.

The change process that applies will depend on which part of the Membership Agreement is being amended.

- Any changes to the Articles of Association will need the consent of at least 75% of the voting members of TeX: this is a legal requirement under the Companies Act 2006.

- The following changes can be made only with the approval of 75% of the membership (the "Membership Approval Process"<sup>3</sup>):
  - (a) Changing any part of the Contract Terms or the service levels.
  - (b) Changing the standards (ie a change from ISO 20022 to a new ISO standard, not an upgrade to the ISO 20022 standard).
  - (c) Introducing any new fees.
  - (d) Increasing the fees in any 12-month period above indexation (ie 10% more than any % increase in the Consumer Price Index).
  - (e) Changing the basis on which the joining fee or membership fee is calculated (fees are currently calculated on a flat-rate basis).

All other parts of the Membership Agreement can be amended using the "Membership Notification Process"<sup>4</sup>, but the board always has the discretion to implement any proposed change via the Membership Approval Process instead, if it wants to ensure a change is supported by the majority of members.

➤ *Diagrams 4 and 5 illustrate the change control process*

#### 4.7 **What is the difference between the change approval process and the change notification process?**

In essence, if a change goes through the Membership Approval Process it can only be implemented if it is positively approved; a change that goes through the Membership Notification Process will be implemented if it is not rejected during the notice period.

A change that is subject to membership approval will be positively approved if:

- (A) it receives the consent of  $\geq 75\%$  of responding members (i) in each of a majority of the member categories (eg 3 out of 5) or (b) in each *eligible* category, if not all categories are affected by the proposed change

#### **AND**

- (B) in each category that has consented to the change, the responding members represent at least 10% of the members in that category (ie a 10% quorum is met by each member class that approves the change – if the 10% quorum was applied across all classes, we could have ended up with the situation where four member classes consent to the change, but the change is knocked out because the fifth class of member has failed to vote at all; this is at odds with the requirement for a majority of the member classes to approve a change).

Under the notification process, a proposed change is notified to the members and 'negative voting' applies - that is, the change is deemed to be approved unless more than 25% of the responding members in each of a majority of the member categories vote against the proposal during the notice period.

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<sup>3</sup> Clause 14.9 of the By-laws

<sup>4</sup> Clause 14.10 of the By-laws

**4.8 The By-laws suggest that a whole of category of members could be excluded from voting on changes – when is this likely to happen?**

If will only happen if the board determines that a category of member is not affected by a proposed change and therefore that category of member is not entitled to vote on that change. While the board has the right to do this<sup>5</sup>, it is not expected to be used often and it is not a decision that the board would exercise lightly. We anticipate that the board would seek external advice before excluding a category of members from voting.

**4.9 How much notice will we get of changes?**

The board will give members at least 3 months' notice of a change, unless the board considers it necessary to invoke an accelerated change procedure with a shorter notice period for more urgent changes.

**4.10 What happens if I don't agree with a change?**

If a change is implemented, then that change will apply to all members. If you rejected the change and no longer want to be part of the club as a result of the change, you have the right to resign from the club at any time by giving TeX at least 5 business days' written notice. This will terminate your Membership Agreement and means that you will no longer have a contractual relationship with each of the other participants in the club: your firm would need to put in place its own agreements with the relevant other parties.

**5. CLUB GOVERNANCE**

**5.1 How is the club governed?**

The Articles of Association set out how the club will be run (eg the voting rights of members, any matters to be determined by vote of the members rather than board decisions), but essentially it will be governed by a board of directors drawn from the membership. The object of the governance provisions is to:

- (a) facilitate a representative view of the different categories of members at general and board meetings;
- (b) enable each member to participate in the management of the contract club, through its membership of TeX and/or through the director(s) of TeX nominated by its membership category;
- (c) ensure that the contract club is not run solely by, and for the benefit of, one section of the industry and/or larger members; and
- (d) entitle TeX to manage the operation of the contract club with appropriate input from representatives of all club participants.

Each category of member can appoint up to 3 directors to the board. It is important to remember that although the directors will be appointed by the membership, they will owe a duty of care to the company as a whole. Each director will have one vote, although the TISA-appointed directors have a right of veto (see question 5.4).

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<sup>5</sup> Clause 14.7 of the By-laws

The Articles of Association allow the board to appoint Advisory Councils, each of which will be a sub-committee of the board. The board can also establish ad hoc working groups for such purposes as the board may specify. In most cases working groups will be discussion groups set up to make recommendations to the appropriate Advisory Council or directly to the board on particular areas from time to time, such as technical issues or legal issues. Terms of reference will be agreed for each working group, such as the objectives and chairmanship of the group.

## 5.2 How will directors be appointed?

The Articles of Association do not specify the process for members to nominate and appoint directors: the process is determined by the board from time to time. The Articles of Association do provide that each member category can appoint up to 3 directors. Although directors are appointed by a particular category of member, each director owes a duty to TeX as a whole. The appointment will be for 2 years, retiring by rotation and a director can be reappointed for 2 further terms (ie up to 6 years in total). Any casual vacancies on the board (eg when a director resigns or ceases to be a director in other circumstances) can be filled by the board until a new director is appointed by the members.

The Articles<sup>6</sup> set out the circumstances in which a person will cease to be a director.

## 5.3 Why are alternate directors not allowed?

Members will appoint certain individuals to the role of director, and those who volunteer to be directors must be able to discharge their duties personally. If we allow alternate directors, it could mean that the appointed director never participates in board meetings. Each category of member can appoint 3 directors, so that every director does not need to attend every board meeting, and board meetings can be held by telephone.

## 5.4 Why does TISA have a right of veto?

As an industry body whose remit extends across the savings and investments marketplace, TISA's role in the contract club is to act as a counterbalance and to provide cross-industry oversight. TISA's right of veto is to ensure that the club best serves the industry as a whole, and not just individual factions, but it will not be used lightly by TISA. TISA's ultimate goal is always to further consumers' best interests, and the TISA directors have a legal duty also to act in the best interests of the company as a whole.

Points to note on the veto right:

- For the veto to be effective, all of the TISA-appointed directors have to vote against the matter in question (up to 3 can be appointed).
- The right of veto will not apply where the TISA-appointed directors have a conflict of interest eg they would be conflicted on a resolution to remove TISA as a member and could not veto that resolution.
- It is not an absolute veto, since the matter can be taken to the membership: there is a statutory right for members with at least 5% of the voting rights to requisition an Extraordinary General Meeting. Note that this right is not (and does not need to be) set out in the Articles of Association because it applies by law.

## 5.5 What happens if TISA leaves the club?

If TISA resigns as a member of TeX, it will no longer be entitled to appoint directors to the TeX board. TISA's resignation may also terminate any services agreement between TISA and TeX and/or TeX's rights to continue using the TISA brand.

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<sup>6</sup> Article 20

**5.6 The quorum for a board meeting needs a director from each member category: couldn't a category of member just block a vote by not turning up?**

The Articles of Association contain provisions to avoid this. If the board meeting is not quorate within half an hour, the meeting will be reconvened 7 days later and those directors who attend the reconvened meeting will constitute a quorum. This is intended to ensure that directors will attend, and not simply abstain.

For a board meeting to be quorate there must be at least 1 director from each category of member that is eligible to appoint directors. This does not apply if the directors appointed by a category of member cannot vote because the category of membership has a conflict of interest (eg if TISA were to have a conflict and its directors were not permitted to vote on an issue as a result) – in that situation, the conflicted category of membership will be disregarded for the purposes of calculating the quorum for the directors' meeting. A director being conflicted from voting at a meeting will not in itself prevent the meeting from being quorate.

**5.7 What are my voting rights as a member?**

The general rule is 'one member, one vote'. Each member who is entitled to vote will have one vote, unless it is part of a corporate group. A corporate group will only have one vote *per category* of membership. This is to avoid undue influence by large groups and ensure fairness in the club.

For example, if a corporate group has 2 asset manager members and 3 service provider members, that group will have one vote only as an asset manager and one vote only as a service provider. In each case, only one of the group entities can exercise the vote; if there is any disagreement between them, the first entity to have been admitted as a member of TeX will be entitled to exercise the vote.

**5.8 How many members need to attend a member meeting?**

The quorum for a member class meeting (eg a meeting of the service provider members) is 2 members from that class entitled to vote. For a general meeting of all members, there needs to be 1 member from each of a majority of classes of membership entitled to vote: this means that while there are 5 categories of member, a voting member from at least 3 out of the 5 categories of membership must be present.

**6. PROVISIONS RELATING TO TRANSFERS**

**6.1 What are my obligations in relation to transfers?**

The document to look at is the Contract Terms, as it sets out the obligations of a member when taking part in a transfer. The obligations are owed to the other participants in the transfer, not TeX.

To some extent, your obligations will depend on whether you are the "Non-Initiating Participant" or "Initiating Participant" in a transfer (see question 6.9). Most of the obligations are collective, but you do have additional obligations if you are the member that instructs the transfer ie the "Initiating Participant" (see question 6.13).

Your key obligations (whatever role you play in a transfer) are:

- (a) to comply with the standards and the service levels as set out in the SLA;
- (b) to monitor and record your performance against the service levels;
- (c) when you receive an electronic message, to authenticate the sender;

- (d) to retain your audit trail of electronic messages sent/received for at least 6 years;
- (e) to notify the other participants on becoming aware that the instruction is fraudulent or unauthorised; and
- (f) to ensure the accuracy of data in any message you create.

#### 6.2 **Why is a share class conversion treated as a transfer?**

In order to allow the non-initiating participant to rely on the initiating participant (with the protection that entails) to obtain the necessary customer instructions or consents to share class conversions, as is already the case in relation to the portfolio transfers and redeeming shares.

The Conversion Share Class for a particular investment is either the only share class available on both ceding and acquiring platforms, or a share class agreed between the non-initiating participant and the initiating participant that the non-initiating participant converts the shares into prior to the transfer.

#### 6.3 **Does the SLA say that parties are transacting purely for change of platform/nominee etc and not any change in beneficial owner?**

Yes. Paragraph 1.4 of the SLA makes it clear that any change in beneficial owner is out of scope. In support of this, the definition of "Transfers" refers to transfer of legal ownership, and the UKFMPG guidance document referenced within the SLA (to indicate the portfolio and re-registration scenarios to which the SLA applies) deals with transfers between platforms/nominees.

#### 6.4 **What are the standards for sending messages?**

If you are sending electronic messages externally (ie to a different party's system) the messages must comply with the ISO 20022 messaging standards. As the purpose of specifying ISO 20022 messages is to ensure inter-operability between different providers' systems, these messaging standards will not apply to internal system messages.

For instructing transfers manually, the content (but not the format) of the message must comply with the mandatory data requirements from the ISO 20022 messaging standards.

#### 6.5 **Is it mandatory to use and respond to discovery messages or can I opt out?**

The use of discovery messages is not mandatory, but if a member receives a discovery message it must respond to that message in accordance with the timescales in the SLA.<sup>7</sup>

Initiating Participants are permitted to use "discovery messages" to request data about a customer (such as about the product and assets that a customer wishes to transfer), but this use is limited:

- to making legitimate requests for data about a customer following the receipt of an instruction to transfer products or assets. A Discovery Message cannot be used for any other data collection purposes;
- to where the Initiating Participant has obtained:
  - the express authority of the customer to request the data sought by the Discovery Message; and

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<sup>7</sup> Section 2.4 of the SLA

- the express consent from the customer for the disclosure of the data sought by the Discovery Message to the requesting party; and
- to the data about the product and assets that the Customer wishes to transfer.

#### 6.6 Are there prescribed standards for authenticating the sender of an instruction?

There are currently no standards in the SLA for authenticating the sender of an electronic message or identifying yourself to the intended recipient. Unless and until authentication standards are agreed in the SLA, it will be up to each member to use whatever methods it considers appropriate according to its internal risk profile. However, each member is entitled to rely on an electronic instruction sent in accordance with the standards and does not need to require that a paper instruction is also sent (although it can do if it has concerns about the instruction - see question 7.3 on "Exceptional Circumstances").

Some members have asked whether letters of authority are needed when processing TeX transfers manually. Letters of authority are not required between TeX members. This is because the purpose of the contract club is to provide a smoother, speedier re-registration process, and the TeX standards have been structured so that the ceding party can rely on the instruction from the acquiring party without making further enquiries.

#### 6.7 Do I have to action a transfer instruction?

If you join the club, the default position is that you have to fulfil a transfer instruction if it is issued by another member in accordance with the standards as set out in the SLA. To support this, the Contract Terms provide that:

- (a) you cannot refuse to execute a transfer just because the instruction is in electronic form (although you can reject an instruction where it has not been sent in the required electronic form, as set out in the SLA);
- (b) you have to accept the initiating participant's (in almost all cases the acquiring party's) authentication of the customer; and
- (c) you have the right to rely on (ie treat as authentic) an instruction that is sent by electronic message in accordance with the standards in the SLA.

The default position does **not** apply:

- if you are notified that the instruction was unauthorised. In no circumstance will a member be compelled to fulfil a transfer when it knows that the transfer has not been authorised by the customer, and the Contract Terms provide that nothing in the Membership Agreement will require a member to do anything that would place it in breach of applicable laws and regulations; or
- where you have legitimate concerns about whether the instruction has been authorised (an "Exceptional Circumstance" - see question 7.3). You cannot reject the instruction in those circumstances, but you can request additional evidence of the customer's identity or of the authenticity of the instruction to give you comfort around fulfilling the transfer. The service levels are disapplied in these circumstances; or
- where you do not have an existing commercial relationship with the other member and the member has still to satisfy any additional due diligence you need to carry out before dealing for the first time.



6.8 **What if the acquiring party is suspended or leaves the club after sending a transfer instruction – do I still have to carry out the transfer?**

Yes. The Contract Terms will continue to apply to these in-flight transfers, but the "Exceptional Circumstances" provisions (outlined in question 7.3) will allow you to request whatever additional information you may need to give you sufficient comfort to complete the transfer.

6.9 **Who are the "initiating participants" and "non-initiating participants" in the Contract Terms – why do the terms not refer to the "acquiring party" and "ceding party" like the UKFMPG document?**

Our aim was to keep the Contract Terms as generic as possible, to minimise duplication in the drafting and to ensure we did not limit the scope of transfers covered by the Contract Terms. That is why the terms do not refer to the specific transfer scenarios in the UKFMPG or to the roles in each transfer.

Instead, we have used the following generic terms:

- **"Participant"** - each member is a "Participant" when it takes part in a transfer. This means that any obligations that apply collectively to "Participants" will apply to each member involved in an individual transfer, whether the member is the fund/asset manager, acquiring party or ceding party in that transfer.
- **"Initiating Participant"** – this is the member who is instructed by the customer (or his adviser) and who initiates the transfer. In almost all circumstances this will be the acquiring party; however, it is not the case in a nominee-to-customer transfer (where the customer, rather than any member, is the "acquiring party") and it may not be the case for other transfers that are added to the scope of the SLA in the future. This is why we have not limited the terms by referring to transfers being initiated by the acquiring party.
- **"Non-Initiating Participant"** – as you might expect, this is any participant in a transfer who is not the "Initiating Participant" eg in a nominee-to-nominee transfer each of the ceding party and the asset manager is a "Non-Initiating Participant".

➤ *Diagram 2 illustrates the participants in a nominee-to-nominee transfer*

6.10 **Many SIPP and ISA administrators use intermediate unitholders - how are they covered by the contract club?**

The category of service provider member was extended in 2015 to include intermediate unitholders. Accordingly, an intermediate unitholder (IUH) can apply to become a service provider member and, as a TeX member, will be subject to the terms of the contract club.

If a TeX member uses an IUH to act as its agent in a transfer and the IUH is a TeX member, then the IUH will be responsible for its compliance with the Contract Terms and for carrying out its obligations in respect of the transfer.

However, if a TeX member uses an IUH to act as its agent in a transfer where the IUH is **not** itself a TeX member, then the TeX member will be liable for the performance of its obligations by the IUH on its behalf (eg ensuring all messages are created and sent in accordance with the standards, compliance with the service levels, and ensuring retention of audit trails). This means that if, for example, the IUH amends the data in a message or sends an incorrect instruction, the TeX member will have to look to its bilateral agreement with the IUH to recover any losses it has incurred to another TeX member as a result.

**6.11 What role does TeX play in relation to transfers?**

None. TeX is not a message exchange and will not become involved in transfers. Each member deals directly with another member and obligations are owed between members participating in the same transfer: TeX will not sit in the middle of these relationships.

**6.12 The Contract Terms assume that transfers will be initiated by the new platform (the acquiring party), but what if the customer asks its existing platform to move funds off the platform?**

In the nominee-to-nominee transfer scenario set out in the UKFMPG the transfer is initiated by the acquiring party, never the ceding party. As such, if the customer approached its existing platform about moving funds to a new platform, the existing platform would need to contact the new platform about this, to allow the new platform to sign up the customer and initiate the transfer. This communication between members is out of scope and there is no prescribed format or service level applicable to it.

**6.13 What additional obligations does the initiating participant have?**

The main one is that the initiating participant has an absolute obligation to authenticate the customer and strict liability attaches to this (see question 8.6). As a minimum, this means carrying out the required anti-money laundering checks and any other background and identity checks that should be run as part of best industry practice. The provisions take account of the fact that the initiating participant may be relying on checks performed by other regulated firms<sup>8</sup>.

Also, the initiating participant must make reasonable enquiry to ensure that the instruction is legitimate, complete and accurate. This is not meant to be onerous - given the short turnaround times within the service levels, what is reasonable in the circumstances could not be expected to be a thorough investigation - but as the ceding party is being asked to rely on the instruction without making further enquiry, the onus needs to be on the acquiring party to make sure the instruction is legitimate and correct. For example, while the use of a discovery message is not a requirement, if the acquiring party decides not to use a discovery message and does not check with the customer or adviser what assets are to be transferred, it needs to be responsible for that decision.

Additionally, the initiating participant, or an intermediate unitholder, is required to confirm whether there are any units in relation to which a share class conversion is necessary prior to transfer.

See Clause 5 of the Contract Terms for the specific obligations of the initiating participant. Clause 6 sets out the specific rights and obligations of a non-initiating participant.

**6.14 What additional obligations does the initiating participant have?**

There may be a situation where the ceding party in a transfer has not carried out AML checks that the fund manager(s) and the acquiring party also involved in that transfer would usually expect the ceding party to carry out.

The Contract Terms oblige an acquiring party initiating the transfer to authenticate the Customer under clause 5.1.1, including carrying out all anti-money laundering checks (and other background and identity checks) required by Applicable Law. This includes, amongst other things, compliance by the Acquiring Party with guidance issued by the JMLSG and the FCA in relation to anti-money laundering, as applicable to that Acquiring Party. It will be for a Ceding Party to determine what its anti-money laundering responsibilities are and how to

<sup>8</sup> This reflects current UK permitted practice as set out in The Joint Money Laundering Steering Group Guidance

discharge them, but those responsibilities are not changed by the TeX Membership Agreement.

There is assurance for an acquiring party that is concerned that a ceding party has not carried out expected checks that may have an impact on the acquiring party. Under clause 7.2.1 of the Contract Terms no Member is required by anything in the Membership Agreement (which includes the Contract Terms) to perform any obligation or to take or omit taking any action that would place it in breach of any Applicable Law. A Member (whatever its role in a transfer) cannot therefore be required by the TeX Membership Agreement to breach the anti-money laundering guidelines of the JMLSG or the FCA, or any other requirements of UK AML legislation that apply to that Member.

#### 6.15 **What about pension providers and pension administrators?**

In January 2014, TeX included pension providers as a new category of TeX member. To join this class you must be the firm responsible for the provision and administration of a pension scheme established in the UK or, if one is appointed for the relevant pension scheme, the pension administrator.

As an initiating participant, a pension administrator warrants and represents that it has been provided with authority by the relevant pension provider prior to initiating a transfer and is complying with any legally binding agreement between it and the pension provider who appointed it as the pension administrator. Where a pension provider has revoked its authority to the pension administrator in its entirety or in relation to a particular transfer, the pension administrator will no longer be entitled to proceed with a transfer that is already underway.

#### 6.16 **What about licences for using security identifiers and SEDOL codes?**

If a party uses SEDOL codes as security identifiers, it must acquire a licence to cover its use of those codes and must stipulate in its contracts that if the other party wishes to store, extract or reproduce SEDOL codes it is responsible for obtaining its own licence from the London Stock Exchange. This requirement is reflected in the TeX By-laws and, for future-proofing purposes, includes any other security identifiers where the recipient has to have its own licence to use them.

## 7. **COMPLYING WITH THE SERVICE LEVELS**

### 7.1 **Do I need to comply with the service levels in all cases?**

No. There is a contractual obligation to comply with the service levels but that is subject to the following exceptions:

- The SLA lists certain types of transfer that fall outside the service levels (eg bulk transfers). These transfers are not defined within the Contract Terms, as the Contract Terms need to be as process-neutral and technology-neutral as possible, but there are guidance notes within the SLA on transfer types that are subject to the exception handling.
- All of the participants in a particular transfer can agree that the service levels will not apply to that transfer, but this opt-out must be reported to TeX within 2 business days<sup>9</sup>.
- If you are a non-initiating participant and there is an "Exceptional Circumstance" (see question 7.3) you do not need to comply with the service levels.

<sup>9</sup> Clauses 3.6.4 and 3.6.5 of the Contract Terms

**7.2 If the service levels are meant to ensure an industry-standard approach, what is the point of allowing participants to opt out of applying them?**

We have to acknowledge that there will be certain transfers where members cannot meet - and therefore need to operate outside - the service levels, but members can only opt out of applying the service levels within the parameters of the Membership Agreement. All members involved in the transfer must agree to disapply the service levels for that transfer, and this agreement to opt out must be reported to TeX. This will allow us to monitor how often members are doing this and whether it is being abused. If members are consistently disapplying the service levels to a particular type of transfer, then TeX can decide whether it should be added to the list of excepted transfers within the SLA.

The other point to mention is that the services levels are meant to ensure that there is a minimum level of service applied across the industry. If 2 members enter into a separate agreement that binds each of them to perform to higher service levels, then that will be permitted. If they try to agree service levels of a lesser standard in a separate agreement, that agreement will be superseded by the service levels in the SLA.

**7.3 What are the "Exceptional Circumstances"?**

These are the situations in which the non-initiating participant (most likely the ceding platform) will not have to (i) comply with the service levels when actioning a transfer or (ii) rely on the initiating participant's authentication of the customer and can request additional evidence of authority.

In summary, these are where<sup>10</sup>:

- (a) the acquiring party's membership has been suspended; or
- (b) the ceding party and/or asset manager (as applicable):
  - (i) has legitimate reason to believe the instruction has not been authorised;
  - (ii) has a legitimate concern about the ability to trust the acquiring party or the veracity of the instruction;
  - (iii) has a legitimate concern that continuing to deal with the acquiring party will hurt its reputation or result in it being in breach of law/regulations or could give rise to it being subject to a regulatory fine or sanction; or
  - (iv) has legitimate concern that the transfer involves a potential pensions liberation which would allow an individual access to his or her pension savings prior to the individual reaching the age of 55 (other than in permitted circumstances) and that the individual may have been misled or not fully informed about the consequences of doing so.

This cannot just be used as way of getting around the service levels or refusing to deal with another member. A member relying on the "Exceptional Circumstance" provisions must have a **legitimate basis** for its concern and must notify that concern to TeX. If the existence of an exceptional circumstance is disputed, then an accelerated dispute resolution process will apply.

Note that in addition to the "Exceptional Circumstance" provisions, the non-initiating participant will not have to action the transfer in accordance with the service levels if the ceding party does not have an existing commercial relationship with the initiating participant

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<sup>10</sup> Clause 6.3.1 of the Contract Terms

and it needs to carry out additional due diligence before dealing with that party for the first time.

#### 7.4 What are the consequences if I don't comply with the service levels?

If you keep failing to meet the service levels, this could give TeX grounds to suspend or terminate your membership<sup>11</sup>. Also, if your failure to comply with the service levels causes another member to incur losses, that member may have an action against you to recover those losses. This will be subject to the provisions of the Contract Terms around what is a recoverable loss (see question 8.1).

Members are required to monitor and record their own performance and to disclose that information periodically to TeX, and a working group has been set up to review the MI and performance across TeX. We anticipate that the FCA will want to see performance data from time to time.

Outside the contract club, you still have to comply with your regulatory requirements. From 1 January 2013 it has been compulsory for platform firms to allow assets to be re-registered off their platforms and the transfer must be carried out within a "reasonable time". The FCA has been very supportive of the TISA project. In PS11/9<sup>12</sup> the FSA (as was) concluded that, in light of the industry arrangements being put in place, it was not appropriate to set any prescriptive rules around timescales at this stage. However, the FSA went on to say that it will use the results of its post-implementation review work to assess the industry's progress and to determine whether prescriptive rules are needed. The FCA will keep a watching brief on what the club is doing and whether firms are meeting the services levels, to check that the industry is delivering what it set out to do.

## 8. LIABILITY AND LOSSES

### 8.1 What losses can I recover from another member?

You can recover any of the specific losses listed in clause 8.5 of the Contract Terms (whether the loss is **direct or indirect**) if the loss arises from<sup>13</sup>:

- (a) the member's breach of the Membership Agreement,
- (b) the transfer, redemption or conversion of assets converted in error; or
- (c) a third party claim in the circumstances where the strict liability applies. The anticipated scenario is that you are the ceding party and have carried out a transfer that was not authorised by the customer; the customer incurred losses and raised an action against you to recover them. In those circumstances, the acquiring party is liable to you for having issued an unauthorised instruction, even if it authenticated the customer (see question 8.6 on strict liability).

If you have incurred a loss that is **not** one of the specific losses listed in clause 8.5, you can still recover that loss if it is a **direct** loss arising from<sup>14</sup>:

- (a) the member's breach of the Membership Agreement, or
- (b) a third party claim in the circumstances where the strict liability applies (as above).

<sup>11</sup> Clause 15 of the By-laws

<sup>12</sup> FSA's Policy Statement PS11/9: Platforms, 1 August 2011 – Reporting on the main issues arising from Consultation Paper 10/29 (Delivering the RDR and other issues for platforms and nominee-related services) and publishing final rules

<sup>13</sup> Clause 8.4.2 of the Contract Terms

<sup>14</sup> Clause 8.4.1 of the Contract Terms

Collectively these are referred to in the Contract Terms as the "**Recoverable Losses**" and there is no financial cap on the recovery of these losses. In addition, you can recover losses that can't be excluded or limited by law (such as losses arising from liability for fraud and death or personal injury). All other losses are excluded.

You will not be able to recover a loss to the extent that the loss has been caused by your own breach, fraud or negligence. Also, you will have to take reasonable steps to minimise your losses. For example, if you become aware of another member's breach and there are measures you can put in place to reduce the impact of the breach on your business, you will need to do that – you cannot simply sit on your hands, incur considerable costs and losses and then try to claim all of those back.

Each member will be responsible for backing-off its obligations with its agents and sub-contractors and will have to look to its bilateral agreement with the relevant third party to recover any losses it has incurred to another TeX member as a result of the third party's failures (eg its failure to transmit messages on behalf of the member in accordance with the service levels). The position is different for those intermediate unitholders who have registered with TeX as a Service Provider Member (see question 6.10) – in that case, the IUH will be subject to the terms of the Membership Agreement and responsible in its own right to other participants for a failure to perform its obligations in respect of a transfer.

➤ *Diagram 3 gives an overview of the liability provisions*

## 8.2 **What is the rationale behind the construction of the liability clause in the Contract Terms, and why is there not the usual exclusion of indirect losses?**

The approach taken by the Legal Working Group in drawing up the Contract Terms was to define the specific types of loss a firm would expect to recover – to give certainty that those losses could be recovered - and then exclude all other losses (with the exception of those losses that cannot be excluded by law).

The Legal Working Group carefully considered those losses that are most likely to be incurred in connection with re-registration and came up with the following exhaustive list<sup>15</sup>:

- The replacement value of assets that have been transferred or redeemed in error.
- Any compensation awarded to a customer by FOS (or the FCA or any other regulator) and any fee or charge that is payable in relation to the investigation of the customer complaint (eg any case fee payable to FOS).
- Any reasonable compensation payments made to a customer, adviser or other third party (including *ex gratia* payments), but there are restrictions around this (see question 8.3).
- The reasonable costs and expenses a party incurs in recovering its direct losses.
- Any regulatory fine, plus the reasonable costs and expenses incurred in dealing with the fine.
- The reasonable costs and expenses (including administrative costs and expenses) incurred by the non-initiating participant in actioning a transfer in an "Exceptional Circumstance" (eg where the ceding party has had to deal with a number of transfers manually, rather than electronically, because additional evidence needs to be requested from the acquiring platform and processed - see question 7.3).

<sup>15</sup> Clause 8.5 of the Contract Terms

- The reasonable costs and expenses incurred in necessary communications with customers and/or advisers (eg the cost of having to write to all customers affected by an error or a breach).

The above list sets out the losses which a party can recover, whether the loss is **direct or indirect** in the circumstances. It is likely that these losses will be direct losses, but the Legal Working Group agreed that a party would want to be able to recover these specific losses whether they were considered to be a direct loss or an indirect loss in the circumstances.

In addition the Legal Working Group determined that if there are any other losses which are not on this list but which are legitimately recoverable as a **direct** loss, then a party should be able to recover those losses too. That will allow the recovery of any direct losses that had not been considered, and will help the future-proofing of the Contract Terms. However, it is anticipated that most parties will seek to recover losses that appear on the list above.

The Legal Working Group debated at length whether certain types of loss should be expressly excluded, such as consequential loss and loss of profits, and there are two main reasons why the group decided against this:

- Reaching consensus on a final list of exclusions would prove difficult, given the differences of opinion on what should be excluded. It was easier to agree a list of those specific losses that would be *included*; and
- There is the risk of excluding a type of loss which members may want to claim in particular circumstances. If a member wanted to recover a direct loss under clause 8.4.1(a) of the Contract Terms, it will need to (i) prove that there had been a breach and that the loss arose from the breach, (ii) demonstrate that the loss is not too remote and (iii) quantify the loss. In addition, the member must have used reasonable endeavours to minimise and mitigate its losses<sup>16</sup> and it cannot recover a loss to the extent it arises from the member's own breach, negligence or fraud<sup>17</sup>. We wanted to avoid the situation where a party can get through all of this and show that a loss is recoverable, only to have recovery denied by blanket exclusion for that type of loss. The Legal Working Group was comfortable to proceed on the basis that a Court will decide, if necessary, on what is a direct or an indirect loss in the circumstances.

The Legal Working Group did not consider it was appropriate to cap members' liability to each other, given the differing values of transfers and the fact that many existing arrangements provided for uncapped liability.

We appreciate that not everyone will be entirely comfortable with the liability position, but the Legal Working Group devoted a great deal of time to considering and debating the liability provisions in order to reach a conclusion on liability that the group thought was reasonable given the potential risks and losses associated with the in-scope transfers.

### 8.3 **Doesn't liability for compensation payments mean that I could be liable for any arbitrary amount that a firm pays to keep a valuable customer happy?**

This was one of the concerns about allowing a member to recover *ex gratia*/compensation payments, and to avoid this we have included parameters around the recovery of compensation payments<sup>18</sup>.

You can only recover the level of compensation that you have **agreed** with the liable party is a reasonable compensation payment in the circumstances – if you decide to make an additional

<sup>16</sup> Clause 8.9 of the Contract Terms

<sup>17</sup> Clause 8.6 of the Contract Terms

<sup>18</sup> Clauses 8.5.4 and 9 of the Contract Terms

payment to the customer or adviser over and above what has been agreed, you will have to bear that additional amount yourself.

To set expectations for the parties' discussion on compensation payment, the Contract Terms lists some non-exhaustive factors to be taken into account in determining what is a reasonable amount<sup>19</sup>. For example, the parties will take into account the level of compensation that the Financial Ombudsman Service might have awarded to the customer (eg based on previous FOS awards for a similar issue), provided the customer would be eligible to apply to FOS. Any dispute about compensation payments will be subject to the accelerated dispute resolution procedure, to encourage the dispute to be resolved quickly.

These provisions deal only with agreeing the level of compensation payment that is recoverable from another member under the Contract Terms. In no way do they limit what compensation a member can pay to customers or when, and the Contract Terms say this expressly.

#### 8.4 **Do the same liability provisions apply for TeX?**

The types of losses that you can recover from TeX are the same, but TeX's liability will be capped at £5m. The Legal Working Group was comfortable with capping TeX's liability on the basis that the TeX-member relationship and associated risk is not the same as the member-member relationship; TeX is providing services to members and is not involved in transfers.

TeX will maintain insurance to cover its liabilities, and the £5m cap has been determined largely by the cost of insurance for such liability.

#### 8.5 **At one stage it was suggested that the acquiring platform would have to give an unlimited indemnity under the contract for strict liability - is that in the contract?**

No. To make the liability provisions palatable to the majority of parties, we moved away from including an indemnity from the acquiring platform.

An indemnity is an express obligation to compensate a party on the occurrence of a defined event, regardless of whether or not it was in the reasonable contemplation of the parties. Feedback indicated that many of the lawyers would have difficulty securing approval within their organisations to sign up to a contract with an unlimited indemnity for this. The position reached in the final Contract Terms is that a ceding platform or asset manager has a right to claim for damages (without limit), but there is not an automatic right of payment on the occurrence of an event giving rise to loss.

We did consider having an indemnity with a financial cap on it, but there was no appetite for this, as most parties have unlimited liability under their existing commercial agreements and would not want to be in a worse position - whether real or perceived - under the terms of the contract club.

#### 8.6 **Why does the acquiring party have strict liability for fraud and what does it mean?**

The whole approach to simplifying and expediting the transfer of assets has been based on the ceding party and the fund/asset manager having to action a transfer without requesting proof that the transfer is genuine (which would delay the transfer). To ensure that those parties can rely on the veracity of the instruction, they need assurance that the acquiring party has verified the identity of the customer and (if applicable) the authority of the adviser, and has checked that the instruction is genuine.

The Contract Terms give them this assurance through (a) the acquiring party's obligations to undertake KYC checks in accordance with applicable law/regulation and best market practice

<sup>19</sup> Clause 9.1 of the Contract Terms



and to ensure the instruction is genuine, and (b) the strict liability of the acquiring party for unauthorised instructions.

The "strict liability" means that the acquiring party is liable for the losses incurred by the ceding platform and/or the asset manager as a result of a fraudulent instruction **even if** the acquiring party has complied with its authentication obligations. Strict liability arises where the acquiring party, despite complying with the Contract Terms, has been outwitted by someone holding themselves out to be the customer (or the customer's adviser) and has submitted an instruction that was not authorised by the customer.

The strict liability clause covers losses resulting from a "third party claim"<sup>20</sup>, which in theory means that it could extend to claims of third parties other than a customer or adviser. However, there must be an actual claim and (disregarding unreasonable or spurious claims which could never be eliminated but hopefully could be dealt with quickly) the claim would need be brought on the basis of a contractual relationship between the liable party and the third party claimant, or some other duty of care between the two of them.

It is worth noting that the acquiring party's strict liability will not absolve the ceding party or the asset manager of any failure to comply with the Contract Terms (eg the ceding party will be liable for a failure to authenticate the sender of a message).

#### 8.7 **Recoverable losses include regulatory fines: does GEN 6.1 of the FCA Handbook not prevent fines from being passed on to another party?**

GEN 6 does not prevent another firm paying or indemnifying against FCA fines. It creates a ban on insurance against FCA fines and stops a firm from paying fines levied on their employees, directors and partners (so there is personal liability). The purpose of GEN 6 is to ensure that financial penalties are paid by the person on whom they are imposed.

There is a more general question around the enforceability of a provision that seeks to recover a fine / penalty; however, the Legal Working Group agreed that it was worth including this as a recoverable loss to allow a member to try and recover a fine that is only imposed as a result of another member's action or failure.

While the Contract Terms allow a party to recover any fine it may have had to pay, in reality it is unlikely that the FCA will fine a party that is not at fault.

### 9. **RESIGNATION, SUSPENSION AND TERMINATION**

#### 9.1 **If I want to leave the club, how much notice do I need to give?**

You can resign from the club at any time, and for no reason, on giving TeX not less than 5 business days' notice in writing. You will not be given a refund of any fees paid.

#### 9.2 **In what circumstances can a member be expelled from the club?**

The By-laws list the situations in which TeX can terminate a party's membership<sup>21</sup>. This includes a change in the party's circumstances that means it no longer meets the membership criteria (eg it loses its FCA authorisation), or the member becomes insolvent, or the party commits a material breach of the terms of the Membership Agreement that hasn't been remedied within 5 business days after receiving notice.

At the same time as TeX serves notice of termination on the member, it has to notify all other members. This puts the membership on notice that a member will be leaving the club on a certain date and allows members to prepare for that.

<sup>20</sup> Clauses 8.4.1(b) and 8.4.2(b) of the Contract Terms

<sup>21</sup> Clause 15.4 of the By-laws

Where TeX is entitled to terminate a party's membership, it can decide to suspend the member instead (eg to investigate the member's situation or to give the member more time to remedy a situation). As termination is a serious matter, it is unlikely to be an option that TeX will exercise lightly, and suspension is a more likely route.

The By-laws set out the process that TeX will have to go through when suspending a member, as well as the member's right to challenge a proposed suspension by making written representations or attending a board meeting to defend its position. The maximum suspension period is 90 days, at the end of which the party's membership will either be reinstated or terminated.

### 9.3 What happens to transfers while I'm suspended?

Any transfers that you instructed prior to the suspension taking effect (in-flight transfers) will proceed as normal, except that the other participants in the transfers will be able to rely on the "Exceptional Circumstance" provisions (see question 7.3). In your role as an acquiring party, you will not be able to instruct transfers during your suspension. In your role as a ceding party or asset manager, suspension will not affect your obligations and you will have to action instructions as normal.

The main impact of suspension is on your rights as a member - you will not be entitled to vote, and you will not count in any quorum for a meeting.

### 9.4 What happens to in-flight transfers if my membership is terminated?

They will need to be carried out in the usual way, and the Contract Terms will continue to apply until all in-flight transfers have been completed. You cannot instruct any new transfers once you have received notice that your membership is being terminated.

### 9.5 What are the consequences of my membership being terminated?

- **Contractual position:** Subject to the position for multi-role members (see next bullet), your Membership Agreement is terminated and this means that you will no longer have a contractual relationship with each of the other participants in the club. You will need to put in place your own agreements with relevant other parties.
- **Multi-role membership:** If you are a multi-role member and your membership is only terminated in one capacity, you will continue as a member in relation to the continuing capacity. For example, if you no longer meet the criteria for an asset manager member but still qualify for service provider membership, your membership will be terminated in your capacity as an asset manager only – you will automatically move from being a multi-role member to being a service provider member.
- **In-flight transfers:** These will continue, and your rights and obligations under the Contract Terms will continue until all in-flight transfers have been completed (see question 9.4). You cannot instruct any new transfers.
- **Survival of terms:** The right to see the audit trail, as well as the provisions relating to liability and dispute resolution, will survive termination. This means that they will still apply to any claim that may arise out a transfer that occurred during your membership, including any in-flight transfer.
- **Directors:** Any TeX director who is engaged or employed by you will cease to be a director.
- **Refund:** No fees will be refunded if your membership is terminated.

## 10. GENERAL

### 10.1 What services does TeX provide to members?

TeX will run and administer the club day-to-day, but it will have no involvement in member to member transfers. TeX's main obligations are:

- (a) to carry out the basic due diligence on applicants;
- (b) to administer the leaver and joiner process;
- (c) to create and maintain the register of members;
- (d) to establish and maintain a website with a secure area that only members and any associates can access;
- (e) to use reasonable skill and care in selecting and appointing any third party responsible for day-to-day processing of the club (ie an outsourced service provider);
- (f) to send a notification to all members and update the register when (i) a member resigns or (ii) a member's membership is being terminated or suspended or (iii) a member is affected by a force majeure event; and
- (g) to hold insurance to underpin its liabilities to members.

### 10.2 What are TeX's obligations in respect of its outsourced service provider/the club operator?

TeX has appointed SWIFT to operate the register of members and the TeX website, but TeX will remain responsible for the management of the club. SWIFT will be a sub-contractor of TeX and TeX will remain responsible to each member for its performance. TeX, as the contracting party, will be responsible for enforcing SWIFT's obligations under any services agreement in place between them.

### 10.3 What happens if members fall out?

All member disputes will be subject to the mandatory dispute resolution procedure (the "DRP"). This will not stop a member from taking Court action to protect its rights of action or for injunctive relief (eg to prevent another party from disclosing its confidential information or continuing with harmful conduct).

The purpose of the DRP is to facilitate the quick and cost-effective resolution of disputes, which is why all disputes are first subject to escalation. If the dispute cannot be resolved through escalation, the parties will proceed to a more formal dispute resolution process involving a third party.

- *The flowchart in Diagram 6 shows the different steps in the dispute resolution procedure and the timescales that apply to each step*

Each member can produce and rely on its audit trail in a dispute. Each member must also assist and, if required, participate in a dispute that relates to a breach or failure in the data transmission chain; this might include producing its audit trail on request to show how data was modified or at what point it was corrupted. This information can only be used for the purpose of resolving the dispute.

### 10.4 Will TeX referee member disputes?

No. TeX will not become involved in a dispute between members. To assist members, TeX may make available from time to time a list of experts, arbitrators and/or mediators from

whom the disputing members may make a selection. There will be no obligation on members to select from this list and TeX will not be liable in relation to any individuals appearing on the list.

**10.5 What obligations do members have in relation to customer data?**

There are no specific obligations imposed by the Membership Agreement. The terms have been drafted on the basis that each member is a data controller of data processed by it as part of any transfer, and therefore each party is responsible for complying with its legal obligations as a data controller (including its responsibility for the secure transmission and storage of its customer data).

Each member is expected to continue to comply with its legal obligations as a data controller following May 2018, when the EU General Data Protection Regulation (GDPR) comes into force.

**10.6 What are other members allowed to do with my data?**

Ownership of customer data and other information shared as part of the operation of the contract club will remain with the originating party: you will remain the owner of data that you give to other members.

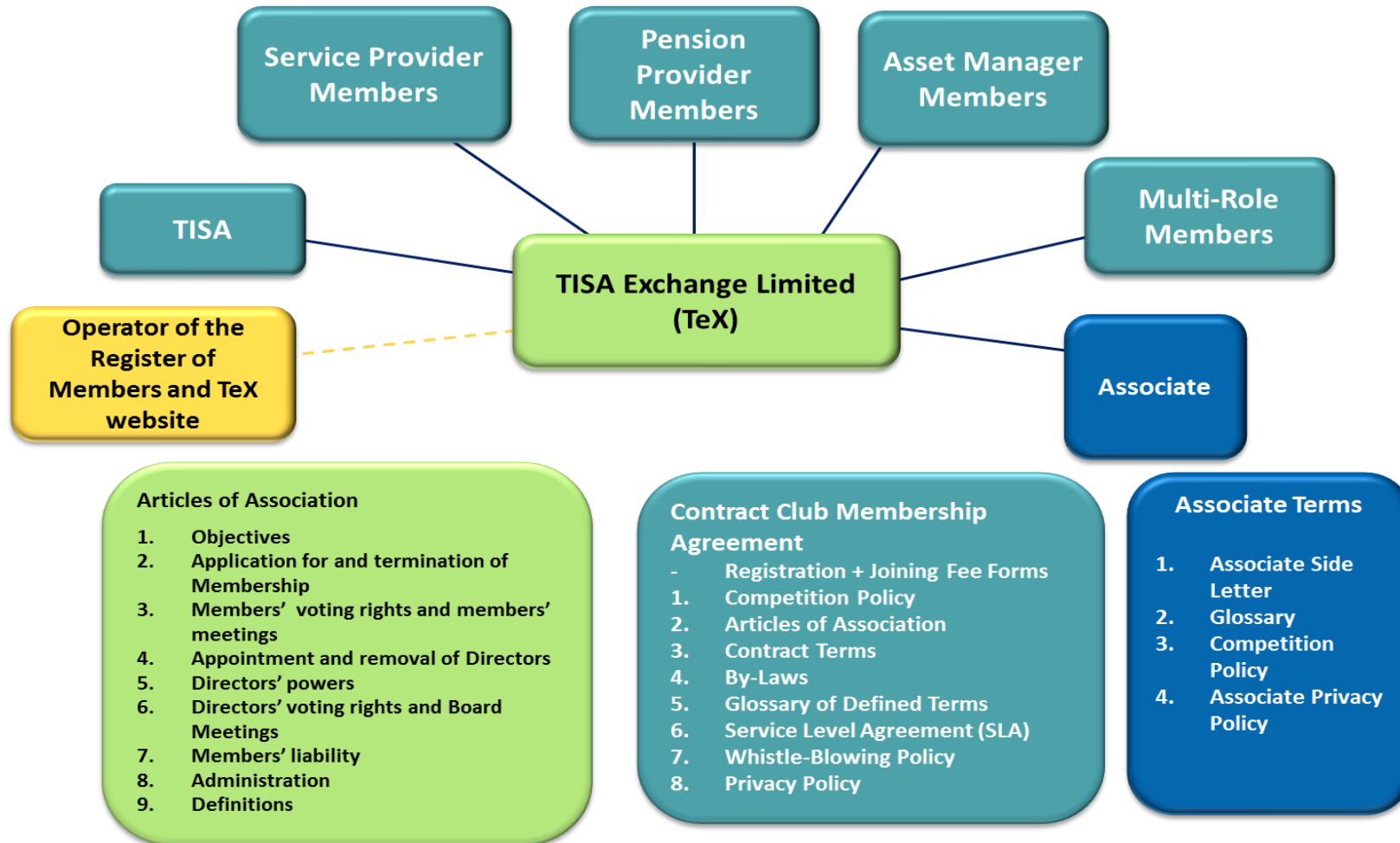
Each member has a limited licence to use your data as required to perform its obligations and exercise its rights under the contract club, including carrying out transfers. There is an express prohibition against members using discovery messages to go on "fishing trips" and to collect customer data they are not authorised to collect.

**10.7 What insurance does TeX carry?**

TeX carries insurance to cover TeX as the operator of the contract club (see question 8.4).

When the original legal working group put together the Contract Club documents, it was decided that there was a need for TeX to take out a group insurance scheme to benefit members. However, after the legal documents were agreed, TeX had further discussions with its insurer and prospective members and decided that group member insurance was not required because: (a) members will have their own cover for transfer activities, and (b) the cost of the group insurance would need to be passed to members as part of the annual membership fee and members did not want to bear that additional cost. The group insurance requirement was removed subsequently from the By-laws (agreed by the LAC at the meeting of 22 May 2013).

DIAGRAM 1: OVERVIEW OF CONTRACT CLUB STRUCTURE



**DIAGRAM 2: HOW THE CONTRACT TERMS DEFINE THE PARTIES IN A TRANSFER**

The example shown in this diagram is nominee-to-nominee re-registration

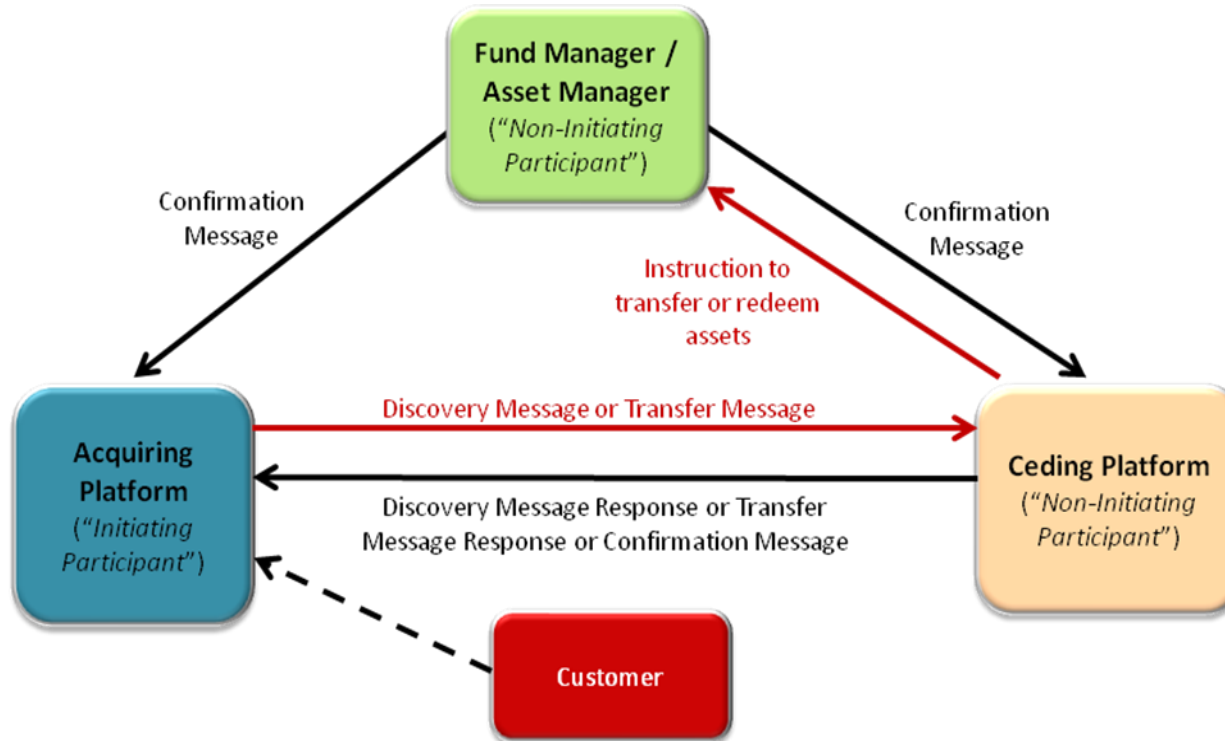
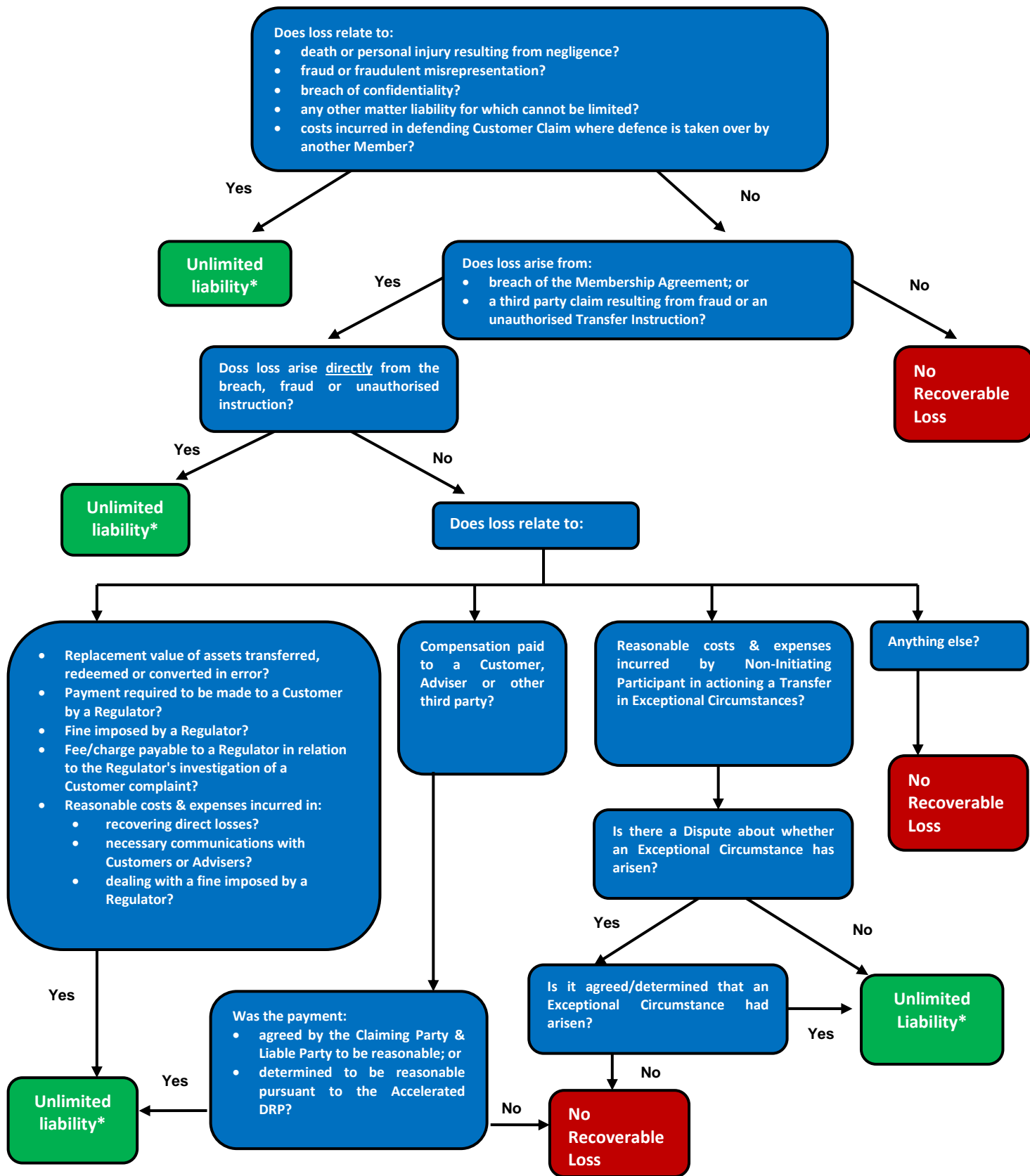


DIAGRAM 3: RECOVERABLE LOSSES



\*Claiming Party:

- must use reasonable endeavours to mitigate loss; and
- cannot recover to extent loss arises because of Claiming Party's breach of the Membership Agreement, negligence or fraud.

Liable Party not required to pay more than once for the same loss. TeX's aggregate liability to all members is capped at £5,000,000 (but not for fraud, death and other liability that can't be limited by law)

DIAGRAM 4: OVERVIEW OF CHANGE CONTROL PROCESS

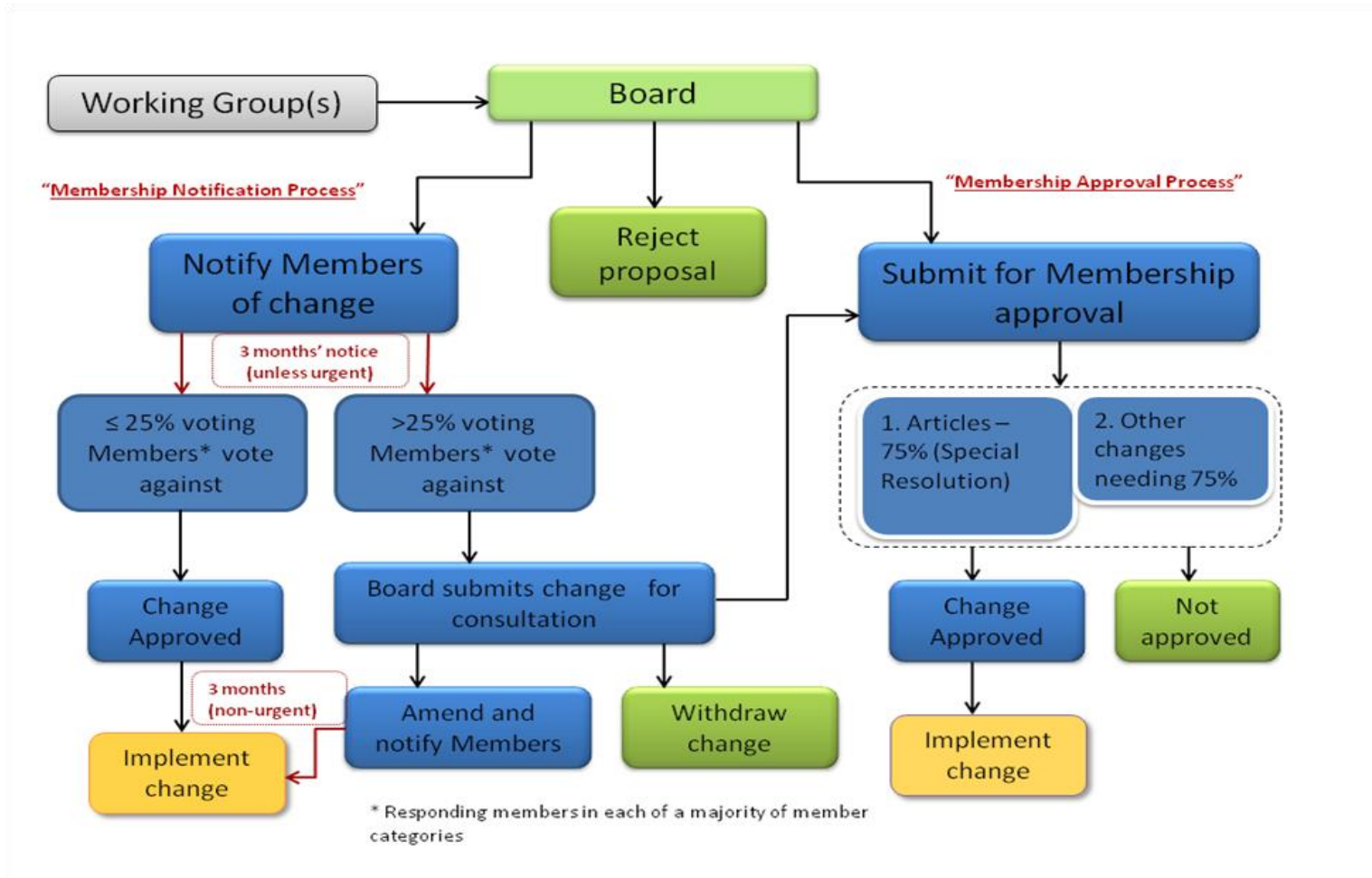
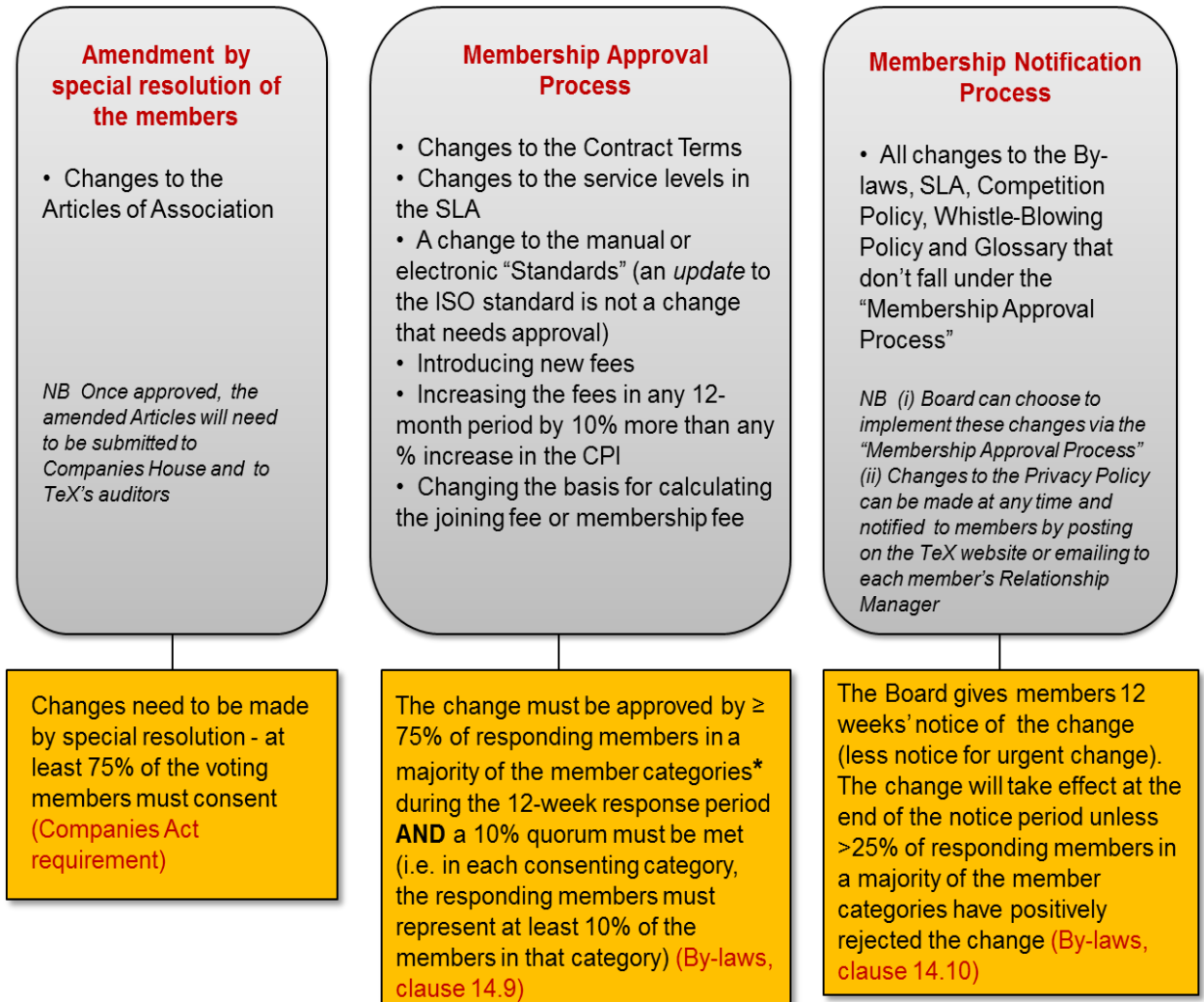




DIAGRAM 5: SUMMARY OF CHANGES SUBJECT TO 'APPROVAL' OR 'NOTIFICATION'



\* Or  $\geq$  75% of responding members in each eligible category, if not all categories of member are affected by the proposed change

**DIAGRAM 6: DISPUTE RESOLUTION PROCEDURE**

All days are business days & the periods applicable to the Accelerated DRP are in brackets

