

# Call for Evidence

On the review of the UCITS Eligible Assets Directive



## Responding to this paper

ESMA invites comments on all matters set out in this paper. Comments are most helpful if they:

- respond to the questions stated;
- indicate the specific question to which the comment relates;
- contain a clear rationale; and
- describe any policy options or alternatives ESMA should consider.

ESMA will consider all comments received by **Wednesday 7 August 2024**.

All contributions should be submitted online at [www.esma.europa.eu](http://www.esma.europa.eu) under the heading 'Your input – Consultations'.

### **Publication of responses**

All contributions received will be published following the close of the consultation, unless you request otherwise. Please clearly and prominently indicate in your submission any part you do not wish to be publicly disclosed. A standard confidentiality statement in an email message will not be treated as a request for non-disclosure. A confidential response may be requested from us in accordance with ESMA's rules on access to documents. We may consult you if we receive such a request. Any decision we make not to disclose the response is reviewable by ESMA's Board of Appeal and the European Ombudsman.

### **Data protection**

Information on data protection can be found at [www.esma.europa.eu](http://www.esma.europa.eu) under the heading '[Data protection](#)'.

### **Who should read this paper?**

This Call for Evidence is of particular interest for investors and consumer groups interested in retail investment products, management companies of Undertakings for Collective Investment in Transferable Securities (UCITS), self-managed UCITS investment companies, depositaries of UCITS and trade associations.

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# 1 Executive Summary

## Reasons for publication

This Call for Evidence ('CfE') is launched in the context of the European Commission's formal request to ESMA to provide technical advice on the review of the Commission Directive 2007/16/EC on UCITS eligible assets ('UCITS EAD'). The Commission has mandated ESMA to carry out an assessment of the implementation of the UCITS EAD in the Member States and to analyse whether any divergences have arisen in this area and to provide a set of recommendations on how the EAD should be revised to keep it in line with market developments.

To this end, ESMA seeks stakeholders input on a number of questions, inter alia, to gather insights on the manner and the extent to which UCITS have gained direct and indirect exposures to certain asset classes that may give rise to divergent interpretations and/or risk for retail investors (e.g. structured/leveraged loans, catastrophe bonds, emission allowances, commodities, crypto assets, unlisted equities).

## Contents

Section 2 provides background information concerning the CfE.

Section 3 sets out the various topics included in the CfE and respective questions.

The Annex includes the mandate received by ESMA from the European Commission for the technical advice on the review of the UCITS EAD.

## Next Steps

Stakeholders are invited to provide feedback by **Wednesday 7 August 2024**.

ESMA will assess the responses to the CfE and develop its technical advice taking into account the evidence collected from stakeholders through this CfE.

## 2 Background

The UCITS Directive<sup>1</sup> dates back to 1985 and has undergone several updates over the past decades. The Directive provides a list of assets eligible for investment by UCITS<sup>2</sup> and in this context uses a variety of broad notions and concepts such as ‘transferable securities’ and ‘money market instruments’.

In 2007, the European Commission published the UCITS EAD<sup>3</sup>, to help market participants and national competent authorities (‘NCAs’) to develop a common understanding of these key concepts and therefore have clarity as to whether a given asset class is eligible for investment.

Since its inception in 2011, ESMA has carried out work in relation to various UCITS investment-related issues and provided guidance to market participants and NCAs, notably by publishing a number of ESMA Q&As<sup>4</sup>, an ESMA Opinion on certain investment limits set out in the UCITS Directive<sup>5</sup> and ESMA Guidelines on exchange-traded funds (ETFs) and other UCITS issues<sup>6</sup> (‘ETF Guidelines’). The ETF Guidelines specify certain issues covered in the UCITS EAD such as rules on tracking financial indices as well as the use of so-called Efficient Portfolio Management (EPM) techniques such as securities lending, repurchase agreements and reverse repurchase agreements. ESMA also performed a peer review in 2018<sup>7</sup> and a follow-up peer review in 2023<sup>8</sup> on the topic of EPM. In addition to this, ESMA’s Common Supervisory Action (CSA) exercise on costs and fees<sup>9</sup> that has been performed jointly with all 30 EU/EEA NCAs throughout 2021, also assessed whether UCITS comply with the applicable legal requirements and ETF Guidelines when using EPM techniques.

UCITS are a key pillar of the EU capital market and the UCITS Directive has created a harmonised and well-functioning regime throughout the European Union for the management and cross-border marketing of investment funds.

The acclaimed success of UCITS as a brand for retail and institutional investors, both within the European Union and globally, hinges on their established reputation of being well-regulated and supervised investment products that provide for a high level of investor protection. In light of this, the UCITS Directive provides a marketing passport that enables authorised market participants to raise capital across the EU from not only professional but also retail investors. Most notably, the UCITS Directive requires that UCITS shall be invested in assets subject to stringent eligibility criteria with a view to ensuring adherence to the principles underlying the UCITS Directive, such as liquidity, risk-diversification, the ability of the UCITS to redeem its

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<sup>1</sup> Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities.

<sup>2</sup> Article 50 of the UCITS Directive.

<sup>3</sup> Commission Directive 2007/16/EC of 19 March 2007 implementing Council Directive 85/611/EEC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities as regards the clarification of certain definitions.

<sup>4</sup> Available at: <https://www.esma.europa.eu/publications-and-data/questions-answers>.

<sup>5</sup> [ESMA Opinion on Article 50\(2\)\(a\) of the UCITS Directive \(ESMA/2012/721\)](#).

<sup>6</sup> [ESMA Guidelines on ETFs and other UCITS issues \(ESMA/2014/937EN\)](#).

<sup>7</sup> [ESMA Final Report on Peer Review on the ESMA Guidelines on ETFs and other UCITS issues \(ESMA42-111-4479\)](#).

<sup>8</sup> [ESMA Follow-up Report to Peer Review on the ESMA Guidelines on ETFs and other UCITS issues \(ESMA42-111-7570\)](#).

<sup>9</sup> [ESMA Final Report on 2021 CSA on costs and fees \(ESMA34-45-1673\)](#).

units or shares at the request of the investors and to calculate its net asset value whenever units are issued or redeemed.

Since the adoption of the UCITS EAD in 2007, the number, type and variety of financial instruments traded on financial markets has increased considerably, leading to uncertainty in determining whether certain categories of financial instruments are eligible for investment. In turn giving rise to divergent interpretations and market practices in terms of the application of the UCITS Directive and possible investor protection concerns.

Against this background, ESMA considers it important to gather stakeholder feedback on market practices and interpretation or practical application issues with respect to the eligibility criteria and other provisions set out in the UCITS EAD.

Previous discussions with NCAs and stakeholders on what constitutes an eligible 'transferable security' proved to be challenging given the formulation of certain criteria set out in the UCITS framework, taking into account the number, type and complexity of assets in question and the need to assess their individual specificities against the list of criteria set out in the EAD. Interpretation questions arose in particular regarding the question of UCITS eligibility of direct or indirect exposures to asset classes such as structured/leveraged loans, catastrophe bonds, commodities, crypto assets and emission allowances.

The UCITS EAD distinguishes between (i) financial instruments backed by, or linked to the performance of other assets and (ii) financial instruments embedding a derivative. Diverging views have been expressed on whether and when a look-through approach is required in these cases to determine the eligibility of the asset and the distinction between the two concepts. This matter is particularly important in the context of discussions on the eligibility of delta-one instruments and exchange-traded products (ETPs) which might provide UCITS with exposures to asset classes that are not eligible for direct investment.

Additionally, this CfE is aimed at gathering insights on other key matters such as the notion of 'liquidity' which is frequently used in the UCITS Directive and UCITS EAD without further specifications. The UCITS EAD requires that the liquidity of transferable securities "does not compromise"<sup>10</sup> the ability of the UCITS to comply with its obligation to repurchase or redeem its units or shares at the request of its investors. However, questions have been raised on how to understand and apply this requirement.

Moreover, the CfE seeks views and experiences on the presumption of liquidity and negotiability set out in the UCITS EAD.<sup>11</sup> In the course of the 2020 ESMA CSA on UCITS liquidity risk management, NCAs identified shortcomings with respect to the presumption of liquidity and negotiability set out in the UCITS EAD.<sup>12</sup> In some cases, UCITS managers placed an overreliance on the presumption of liquidity where they invested in listed securities (e.g. instruments listed offshore with no meaningful trading volume). In some other cases, UCITS

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<sup>10</sup> Article 2(1)(b) of the UCITS EAD.

<sup>11</sup> Last sub-paragraph of Article 2(1) of the UCITS EAD.

<sup>12</sup> [ESMA public statement on the 2020 CSA on UCITS liquidity risk management \(ESMA34-43-880\)](#).

managers applied the presumption of liquidity also to non-listed instruments. Some stakeholders and NCAs expressed support for further legislative clarifications with a view to ensuring that market participants have a clear understanding of the regulatory expectations and that NCAs have a stronger legal basis to take follow-up supervisory or enforcement actions.

### 3 Call for evidence – Questions to stakeholders

This CfE is divided into separate sections which seek to collect evidence on the following aspects of the ESMA mandate for technical advice:

- Convergence issues and clarity of key concept and definitions (Section 3.1);
- Direct and indirect UCITS exposures to certain asset classes and related data collection/analysis (Section 3.2);

Respondents are invited to substantiate and share as much evidence as possible (including any available data or estimates) in support of their responses to the different questions set out in this CfE.

#### 3.1 Convergence issues and clarity of key concepts

This section aims to gather evidence and views from stakeholders on the clarity of key concepts and potential interpretation and convergence issues with the application of the UCITS EAD. The questions set out below draw on previous ESMA workstreams and issues brought to ESMA's attention by stakeholders.

**Q1:** In your view, what is the most **pressing issue to address in the UCITS EAD** with a view to improving investor protection, clarity and supervisory convergence across the EU?

**Q2:** Have you experienced any recurring or significant issues with the interpretation or consistent application of UCITS EAD rules<sup>13</sup> with respect to **financial indices**?

If so, please describe any recurring or significant issues that you have experienced and how you would propose to amend the UCITS EAD to improve investor protection, clarity and supervisory convergence. Where relevant, please specify what indices this relates to and what were the specific characteristics of those indices that raised doubts or concerns. Where possible, please provide data to substantiate the materiality of the issue.

**Q3:** Have you experienced any recurring or significant issues with the interpretation or consistent application of UCITS EAD rules<sup>14</sup> with respect to **money market instruments**?

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<sup>13</sup> In particular Articles 9 and 12 of the UCITS EAD.

<sup>14</sup> In particular Articles 3 to 5 of the UCITS EAD.

If so, please describe the issues you have experienced and how you would propose to amend the UCITS EAD to improve investor protection, clarity and supervisory convergence. Where relevant, please describe the specific characteristics of the money market instruments that raised doubts or concerns.

**Q4:** Have you experienced any recurring or significant issues with the interpretation or consistent application of UCITS EAD provisions<sup>15</sup> using the notions of « **liquidity** » or « **liquid financial assets** »?

If so, please describe the issues you have experienced and how you would propose to amend the UCITS EAD to better specify these notions with a view to improving investor protection, clarity and supervisory convergence. Where relevant, please explain any differences to be made between the liquidity of different asset classes<sup>16</sup>.

**Q5:** The 2020 ESMA CSA on UCITS liquidity risk management identified issues with respect to the **presumption of liquidity and negotiability** set out in UCITS EAD<sup>17</sup>.

In light of the changed market conditions since 2007, do you consider such a presumption of liquidity and negotiability still appropriate? Where possible, please provide views, data or estimates on the possible impact of removing the presumption of liquidity and negotiability set out in the UCITS EAD.

**Q6:** Please explain your understanding of the notion of **ancillary liquid assets**<sup>18</sup> and any recurring or significant issues that you might have experienced in this context. Please clarify if these are held as bank deposits at sight and what else is used as ancillary liquid assets. Where relevant, please distinguish between ancillary liquid assets denominated in (1) the base currency of the fund and (2) foreign currencies.

**Q7:** Beyond holding currency for *liquidity* purposes, do you think UCITS should be permitted to acquire or hold **foreign currency** also for *investment* purposes, taking into account the high volatility and devaluation/depreciation of some currencies?<sup>19</sup> Where relevant, please distinguish between direct and indirect investments.

**Q8:** Have you observed any recurring or significant issues with the interpretation or consistent application of the **10% limit** set out in the UCITS Directive for investments in transferable securities and money market instruments other than those referred to in Article 50(1) of the UCITS Directive?<sup>20</sup>

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<sup>15</sup> In particular Article 2(1)(c) of the UCITS EAD.

<sup>16</sup> For example, differences between the liquidity of equity and debt instruments.

<sup>17</sup> Article 2(1) last sub-paragraph of the UCITS EAD. See also pages 3 and 4 of the [ESMA report on the 2020 CSA on UCITS liquidity risk management](#) on the issues observed in this respect.

<sup>18</sup> Pursuant to the second subparagraph of Article 50(2) of the UCITS Directive. Please also see Recital 41 of the UCITS Directive.

<sup>19</sup> Please specify to what extent this is done pursuant to Article 50(1)(f) in conjunction with Article 52(1)(b) of the UCITS Directive.

<sup>20</sup> Article 50(2)(a) of the UCITS Directive. Please note also the aforementioned [2012 ESMA Opinion](#) on this provision.



If so, please explain the issues and how you would propose to address them in the UCITS EAD with a view to improving investor protection, clarity and supervisory convergence.

**Q9:** Are the ‘**transferable security**’ criteria set out in the UCITS EAD<sup>21</sup> adequate and clear enough? If not, please describe any recurring or significant issues that you have observed and how you would propose to amend the UCITS EAD to improve investor protection, clarity and supervisory convergence.

**Q10:** How are the **valuation** and **risk management-related** criteria set out in the UCITS EAD<sup>22</sup> interpreted and applied in practice, in particular the need for (1) risks to be “adequately captured” by the risk management process and (2) having “reliable” valuation/prices.

Please describe any recurring or significant issues that you have observed with the interpretation or consistent application of these criteria and how you would propose to amend the UCITS EAD to improve investor protection, clarity and supervisory convergence.

**Q11:** Are the UCITS EAD provisions on investments in **financial instruments backed by, or linked to the performance of assets other than those listed in Article 50(1) of the UCITS Directive** adequate and clear enough?<sup>23</sup>

Please describe any recurring or significant issues that you have observed in this respect and how you would propose to amend the UCITS EAD to improve investor protection, clarity and supervisory convergence.

**Q12:** Is the concept of « **embedded** » derivatives set out in the UCITS EAD<sup>24</sup> adequate and clear enough?

Please describe any recurring or significant issues that you have observed with the interpretation or consistent application of this concept and how you would propose to amend UCITS EAD to improve investor protection, clarity and supervisory convergence.

**Q13:** Linked to Q11 and Q12, ESMA is aware of diverging interpretations on the treatment of **delta-one instruments** under the EAD, taking into account that they might provide UCITS with exposures to asset classes that are not eligible for direct investment (see also Section 3.2). How would you propose to amend the UCITS EAD to improve investor protection, clarity and supervisory convergence? Please provide details on the assessment of the eligibility of different types of delta-one instruments, identify the issues per product and provide data to support the reasoning.

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<sup>21</sup> Article 2(1)(a) to (g) of the UCITS EAD.

<sup>22</sup> In particular Article 2(1)(c) and (g) of the UCITS EAD.

<sup>23</sup> Article 2(2)(c) of the UCITS EAD.

<sup>24</sup> In particular Articles 2(3) and 10 of the UCITS EAD.

**Q14:** Have you observed any recurring or significant issues with the interpretation or consistent application of the rules on **UCITS investments in other UCITS and alternative investment funds (AIFs)**? In this context, have you observed any issues in terms of the clarity, interaction and logical consistency between (1) the rules on investments in UCITS and other open-ended funds set out in the UCITS Directive<sup>25</sup> and (2) the provisions on UCITS investments in closed-ended funds set out in the UCITS EAD<sup>26</sup>?

Please describe any recurring or significant issues that you have observed in this respect and how you would propose to amend the relevant rules to improve investor protection, clarity and supervisory convergence. Where relevant, please distinguish between different types of AIFs (e.g. closed-ended, open-ended), investment strategies (real estate, hedge fund, private equity, venture capital etc.) and location (e.g. EU, non-EU, specific countries). In this context, please also share views on whether there is a need to update the legal wording used in the UCITS EAD and UCITS Directive given the fact that e.g. they refer to ‘open-ended’ and ‘closed-ended funds’, whereas it might seem preferable to use the notion of ‘AIFs’ by now given the subsequent introduction of the AIFMD<sup>27</sup> in 2011.

**Q15:** More specifically, have you observed any recurring or significant issues with the interpretation or consistent application of the rules on **UCITS investments in (1) EU ETFs and (2) non-EU ETFs**?

Please describe any issues that you have observed in this respect and how you would propose to amend the relevant rules to improve investor protection, clarity and supervisory convergence.

**Q16:** How would you propose to amend the UCITS EAD<sup>28</sup> to improve investor protection, clarity and supervisory convergence with respect to the **Efficient Portfolio Management (EPM)-related issues** identified in the following ESMA reports:

- (1) [Peer Review on the ESMA Guidelines on ETFs and other UCITS issues](#)<sup>29</sup>;
- (2) [Follow-up Peer Review on the ETF Guidelines](#); and
- (3) [CSA on costs and fees](#).

In this context, ESMA is interested in also gathering evidence and views on how to best address the uneven market practices with respect to securities lending fees described in the aforementioned ESMA reports with a view to better protect investors from being overcharged.

**Q17:** Would you see merit in linking or replacing the **notion of EPM** techniques set out in the UCITS Directive and UCITS EAD with the **notion of securities financing transaction (SFT)**

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<sup>25</sup> Article 50(1)(e) of the UCITS Directive.

<sup>26</sup> Article 2(2)(a) and (b) of the UCITS EAD.

<sup>27</sup> Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers.

<sup>28</sup> In particular Article 11 of the UCITS EAD.

<sup>29</sup> In particular the policy recommendations set out in Section III thereof.

set out in the SFTR<sup>30</sup>? Beyond the notions of EPM and SFT, are there any other notions or issues raising concerns in terms of transversal consistency between the UCITS and SFTR frameworks?

**Q18:** Apart from the definitions and concepts covered above, are there any **other definitions, notions or concepts used in the UCITS EAD** that may require updates, further clarification or better consistency with definitions and concepts used in other pieces of EU financial legislation, e.g. MiFID II<sup>31</sup>, EMIR<sup>32</sup>, Benchmark Regulation<sup>33</sup> and MMFR<sup>34</sup>?

If so, please provide details on the issues you have observed and how you would propose to clarify or link the relevant definitions or concepts.

**Q19:** Are there any national rules, guidance, definitions or concepts in **national regulatory frameworks** that go beyond ('gold-plating'), diverge or are more detailed than what is set out in the UCITS EAD? If so, please elaborate whether these are causing any recurring or significant practical issues or challenges.

### 3.2 Direct and indirect UCITS exposures to certain asset classes

This section aims to assess possible risks<sup>35</sup> and benefits of UCITS gaining exposures to asset classes on which there are divergent views as regards their eligibility as UCITS investments.

This covers both direct and indirect exposures such as via so-called delta-one instruments, (embedded) derivatives and replication of financial indices. Thus, the questions in this section are aimed at further solidifying ESMA's understanding on the extent to which UCITS have gained direct and indirect exposures to certain asset classes that may give rise to risk for retail investors. Conscious of the diverging views and interpretations, ESMA is interested in receiving stakeholder analyses, data and views to assess the merits of allowing UCITS to gain direct or indirect exposures to the asset classes listed below.

**Q20:** Please fill in the table below on the **merits of allowing direct or indirect UCITS exposures** to the asset classes listed therein, taking into account the additional instructions provided in the footnotes.

Please assess and provide evidence on the merits of such exposures in light of their **risks and benefits** taking into account the **characteristics of the underlying markets** (e.g. availability of reliable valuation information, liquidity, safekeeping).

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<sup>30</sup> Regulation (EU) 2015/2365 of the European Parliament and of the Council of 25 November 2015 on transparency of securities financing transactions and of reuse.

<sup>31</sup> Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments.

<sup>32</sup> Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories.

<sup>33</sup> Regulation (EU) 2016/1011 of the European Parliament and of the Council of 8 June 2016 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds.

<sup>34</sup> Regulation (EU) 2017/1131 of the European Parliament and of the Council of 14 June 2017 on money market funds.

<sup>35</sup> For example, additional counterparty risks and costs.

To substantiate your position, please fill the table with any available **data and evidence** (e.g. on liquidity or valuation of the relevant asset classes and underlying markets). ESMA acknowledges that the availability of data on direct/indirect exposures to some of the asset classes listed in this table is limited and would welcome receiving any available data (whether on individual market participants and products or market-wide) and even rough estimates that help to understand the practical relevance of the relevant asset class for UCITS and the possible impact of any future policy measures.

<b>Asset class<sup>36</sup></b>	<b>Merits of allowing direct UCITS exposures</b>	<b>Merits of allowing indirect UCITS exposures<sup>37</sup></b>	<b>Extent/amount of existing UCITS exposures<sup>38</sup></b>	<b>Additional comments<sup>39</sup></b>
1. Loans <sup>40</sup>				
2. Catastrophe bonds ('Cat bonds')				
3. Contingent Convertible bonds ('CoCo bonds')				
4. Unrated bonds				
5. Distressed securities				
6. Unlisted equities <sup>41</sup>				
7. Crypto assets <sup>42</sup>				

<sup>36</sup> ESMA acknowledges that most of the asset classes listed below have not been clearly defined in EU legislation and this might be a source of divergent interpretations and misunderstandings. Where possible, ESMA invites stakeholders to specify their understanding or definition of the relevant asset classes under the "additional comments" box.

<sup>37</sup> Where relevant, please distinguish between indirect exposures via instruments such as delta-one instruments, exchange-traded products, derivatives, or AIFs (EU or non-EU).

<sup>38</sup> Please share any available data or estimates that help to assess the amount or extent to which there are existing UCITS exposures (distinguishing between direct and indirect, where possible) to these asset classes. Where no reliable data is available, ESMA would appreciate receiving estimates in terms of numbers and/or percentages of UCITS exposed to these asset classes and what is the average proportion in the relevant portfolios. Any additional data and insights on strategies, techniques and instruments used to gain exposure to these asset classes would be also highly appreciated.

<sup>39</sup> Please include under this column any other evidence or views that you would like to share.

<sup>40</sup> Where relevant, please distinguish between leveraged/structured loans, collateralised loan obligations (CLOs) and other types of loans or loan participations (please specify).

<sup>41</sup> Where relevant, please distinguish between equity instruments issued by (1) private companies and (2) shares in public companies that are not listed.

<sup>42</sup> Where relevant, please specify what type of crypto assets and whether the implementation of MICA will change anything in terms of your assessment. With respect to indirect exposures, ESMA is particularly interested in stakeholder input on exchange-traded products including ETFs with crypto assets as an underlying.

8. Commodities and precious metals <sup>43</sup>				
9. Exchange-traded commodities ('ETCs')				
10. Real estate				
11. Real Estate Investment Trusts ('REITs')				
12. Special Purpose Acquisition Companies ('SPACs')				
13. EU AIFs <sup>44</sup>				
14. Non-EU AIFs				
15. Emission allowances				
16. Delta-one instruments				
17. Exchange-traded notes ('ETNs')				
18. Asset-backed securities ('ABS') including mortgage-backed securities ('MBS')				
19. Other relevant asset classes (please specify)				

<sup>43</sup> With respect to indirect exposures, ESMA is particularly interested in stakeholder input on ETFs with commodities/precious metals as underlying. Please note that under the current UCITS rules, precious metals and certificates representing them are not eligible (Article 50(2)(b) of the UCITS Directive).

<sup>44</sup> Where relevant, please distinguish between different types of AIFs (e.g. open-ended, closed-ended) and investment strategies (e.g. real estate, private equity, hedge funds).

**Q21:** Please elaborate and provide evidence on how indirect exposures to the aforementioned asset classes (e.g. through delta-one instruments, ETNs, derivatives) **increase or decrease costs and/or risks** borne by UCITS and their investors compared to direct investments.

**Q22:** Under the EAD, should a **look-through approach** be required to determine the eligibility of assets? Please explain your position taking into account the aforementioned risks and benefits of UCITS gaining exposures to asset classes that are not directly investible as well as the increased/decreased costs associated with such indirect investments.

A look-through approach would aim to ensure that the list of eligible asset classes set out in the UCITS Level 1 Directive<sup>45</sup> would be deemed exhaustive and reduce risk of circumvention by gaining indirect exposures to ineligible asset classes via instruments such as delta-one instruments, exchange-traded products or derivatives. Where possible, please provide views, data or estimates on the possible impact of such a possible policy measure.

**Q23:** What are the risks and benefits of UCITS investments in **securities issued by securitisation vehicles**? Please share evidence and experiences on current market practices and views on a possible need for legislative clarifications or amendments.<sup>46</sup>

**Q24:** What are the risks and benefits of permitting UCITS to **build up short positions** through the use of (embedded) derivatives, delta-one instruments or other instruments/tools? Please share evidence and experiences on current market practice and views on a possible need for legislative clarifications or amendments.

**Q25:** Apart from the topics covered in the above sections, have you observed **any other issues** with respect to the interpretation or consistent application of the UCITS EAD?


If so, please describe the issues and how you would propose to revise the UCITS EAD or UCITS Directive with a view to improve investor protection, clarity and supervisory convergence.

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<sup>45</sup> Article 50(1) of the UCITS Directive.

<sup>46</sup> Taking into account Article 7 of the UCITS EAD on securitisation vehicles which benefit from a banking liquidity line.

## 4 Annex - European Commission mandate

 Ref. Ares(2023)3906255 - 06/06/2023

EUROPEAN COMMISSION  
DIRECTORATE-GENERAL FOR FINANCIAL STABILITY, FINANCIAL SERVICES  
AND CAPITAL  
MARKETS UNION  
Director General

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**Subject: Formal request to ESMA for technical advice on the review of Commission Directive 2007/16/EC on UCITS eligible assets**

Dear Ms Ross,

Directive 2009/65/EC on Undertakings for Collective Investment in Transferable Securities (“UCITS Directive”) is a key pillar of the EU Capital Market Union and has created a harmonised and well-functioning regime throughout the European Union for the management and marketing of mutual funds to retail investors.

The success of UCITS as a brand for retail and institutional investors, both within the European Economic Area and globally, is tied to their reputation as sound and well-regulated investment products. In particular, UCITS invest in assets subject to eligibility criteria aimed at ensuring that they are able to meet all their obligations, including in terms of portfolio liquidity, net asset value calculation and limits monitoring.

The scope of UCITS eligible assets is specified in Commission Directive 2007/16/EC of 19 March 2007 (*see* OJ L79, 20.3.2007, p. 11; hereinafter “Eligible Assets Directive”) which, in turn, refers to Directive 85/611/EEC, a previous version of the UCITS Directive. The Eligible Assets Directive being in force since 2007, the Commission deems it important to take stock of the

market practices to ensure that the eligibility rules are implemented in a uniform manner in all Member States, also taking into account market and regulatory developments that have occurred over the past 16 years.

The Commission therefore mandates ESMA to carry out an assessment of the implementation of the Eligible Assets Directive in the Member States, to analyse whether any divergences have arisen in this area and to provide the Commission with a set of recommendations on how the Eligible Assets Directive should be revised to keep it in line with market developments. In particular, ESMA should analyse the merits of linking certain definitions and concepts to other pieces of the EU acquis given the need to provide greater clarity, legal certainty and uniformity to UCITS management companies and additional protections to UCITS investors (e.g. MIFID II, EMIR, the Benchmark Regulation or MMFR). ESMA is invited to analyse the consistent application, amongst others, of “delta-one” instruments related provisions, indices, efficient portfolio management (EPM) techniques, the definition of money market instruments as well as the notion of liquidity and presumption thereof in relation to certain transferable securities.

In this context, ESMA is invited to propose clarifications on the key definitions and the criteria against which the eligibility of an asset is assessed. ESMA is also requested to analyse whether and to what extent cross-references to other EU legal frameworks could improve legal clarity and, where appropriate, consistency between these frameworks.

ESMA is also invited to assess the risks and benefits of UCITS gaining exposures to asset classes that are not directly investable for UCITS, e.g. through delta-one instruments, (embedded) derivatives and financial indices. In relation to EPM, ESMA is also invited to advise on possible legislative clarifications to address the shortcomings identified in the context of its supervisory convergence work, notably the 2018 ESMA Peer Review on the Guidelines on ETFs and other UCITS issues<sup>47</sup> and its follow-up work performed in this respect as well as the ESMA Common Supervisory Action (CSA) on costs and fees in 2021<sup>48</sup>.

To this end, ESMA is invited to conduct a data gathering exercise with NCAs, and, where needed, with market participants to gather insights on the manner and the extent to which UCITS have gained direct and indirect exposures to certain asset categories that may give rise to divergent interpretations and/or risk for retail investors (e.g. structured/leveraged loans, catastrophe bonds, emission allowances, commodities, crypto assets, unlisted equities, and other relevant asset classes). ESMA should use the technical input and the data by the NCAs and collect, where needed, the empirical evidence and data to be provided by NCAs to the extent required and deemed necessary by ESMA. NCAs are urged to fully cooperate with ESMA in providing the requested data and to dedicate sufficient time and effort to ensure good-quality input as per ESMA’s request.

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<sup>47</sup> [https://www.esma.europa.eu/sites/default/files/library/esma42-111-4479\\_final\\_peer\\_review\\_report\\_guidelines\\_on\\_etfs.pdf](https://www.esma.europa.eu/sites/default/files/library/esma42-111-4479_final_peer_review_report_guidelines_on_etfs.pdf).

<sup>48</sup> [https://www.esma.europa.eu/sites/default/files/library/esma34-45-1673\\_final\\_report\\_on\\_the\\_2021\\_csa\\_on\\_costs\\_and\\_fees.pdf](https://www.esma.europa.eu/sites/default/files/library/esma34-45-1673_final_report_on_the_2021_csa_on_costs_and_fees.pdf).



Where the definitions and eligibility criteria proposed by ESMA might allow for exposure to the abovementioned asset classes, ESMA shall assess whether these exposures are adequate in the context of the UCITS taking into account the characteristics of the underlying market (e.g. availability of valuation, liquidity, safekeeping, etc.). ESMA is invited to rely upon and provide the Commission services with up-to-date data that would allow the latter to obtain insights into the absolute and relative size of such asset classes in the context of the UCITS market. In particular, ESMA should make a preliminary assessment of the impacts of the proposed regulatory adjustments, if any, taking into account the characteristics of the underlying market (e.g. availability of valuation, liquidity, assets safekeeping, etc.).

ESMA is also invited, in its technical advice, to recommend which changes, if any, would be appropriate and could be achieved at Level 2 level and, if appropriate, which Level 1 amendments would appear appropriate and necessary in the medium and long-term.

To allow for a comprehensive public consultation, ESMA is requested to deliver its technical advice by **31 October 2024**.

To ensure legal certainty of the application of the UCITS rules and protect the reputation of the UCITS brand, both within the European Union and in third countries, I would like to emphasise that this request for a technical advice should aim to preserve and strengthen the well-functioning of the UCITS framework and the operation of the UCITS management companies in the best interest of investors, as well as the quality of investment products offered to retail clients.

Any respective discussions at ESMA's level in connection herewith or the technical advice delivered by ESMA shall not be used, referred to or relied upon as representing an official position or pre-judge any possible action of the European Commission.

I look forward to receiving ESMA's input and remain at your disposal for any questions.

Yours sincerely,

Electronically signed