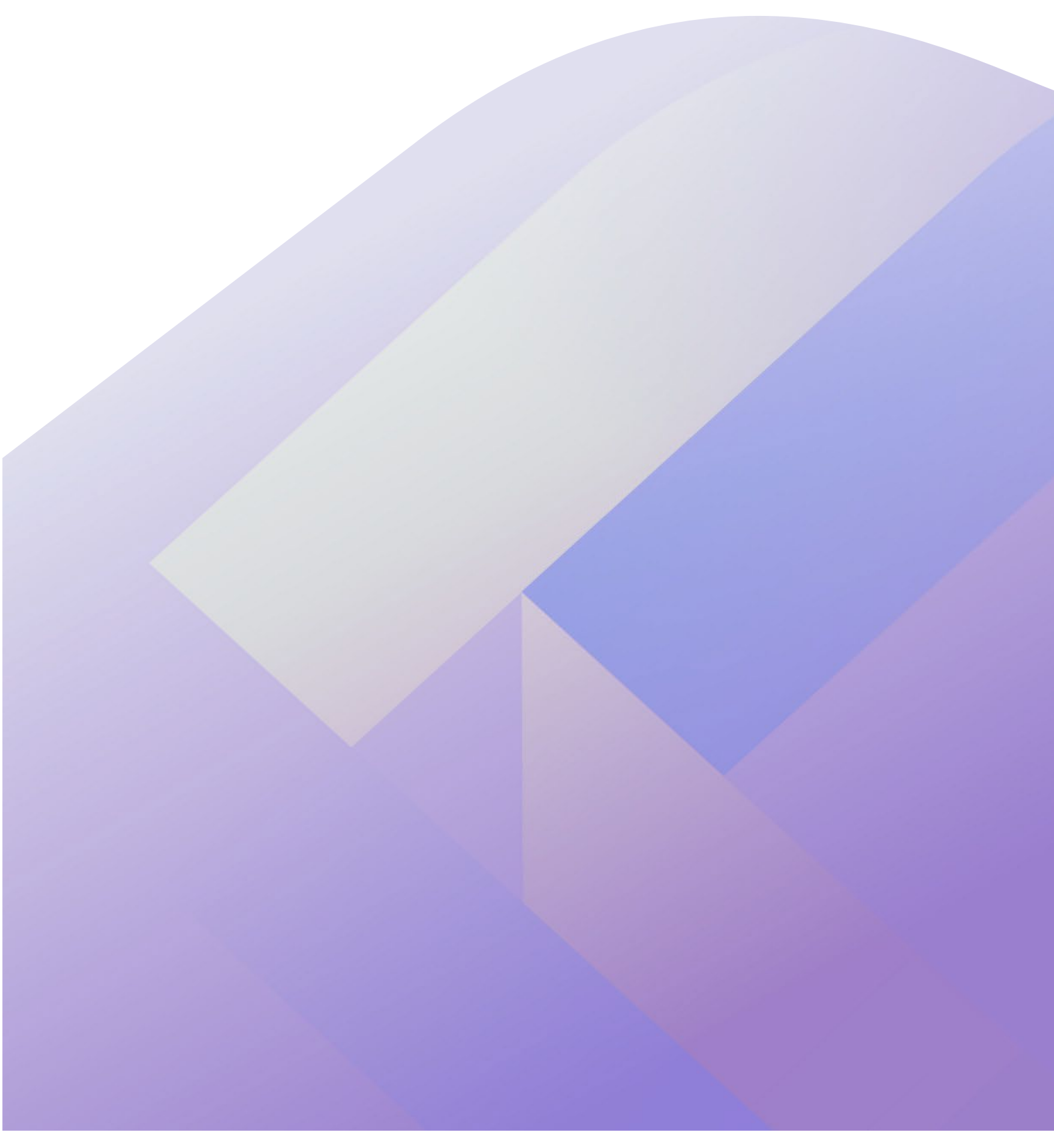


Reply form

On the review of the UCITS Eligible Assets Directive



Responding to this paper

ESMA invites comments on all matters in this paper and in particular on the specific questions summarised in Annex 1. Comments are most helpful if they:

- respond to the question stated;
- indicate the specific question to which the comment relates;
- contain a clear rationale; and
- describe any 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 under the heading 'Your input - Consultations'.

Instructions

In order to facilitate analysis of responses to the Call for Evidence, respondents are requested to follow the below steps when preparing and submitting their response:

- Insert your responses to the questions in the Call for Evidence in this reply form.
- Please do not remove tags of the type < ESMA_QUESTION_EADC_0>. Your response to each question has to be framed by the two tags corresponding to the question.
- If you do not wish to respond to a given question, please do not delete it but simply leave the text "TYPE YOUR TEXT HERE" between the tags.
- When you have drafted your responses, save the reply form according to the following convention: ESMA_CP1_EADC_nameofrespondent.

For example, for a respondent named ABCD, the reply form would be saved with the following name: ESMA_CP1_EADC_ABCD.

- Upload the Word reply form containing your responses to ESMA's website (**pdf documents will not be considered except for annexes**). All contributions should be submitted online at <https://www.esma.europa.eu/press-news/consultations/call-evidence-review-ucits-eligible-assets-directive> 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 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.

1 General information about respondent

Name of the company / organisation	Swedish Investment Fund Association
Activity	Industry organisation
Country / Region	Sweden

2 Questions

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?

<ESMA_QUESTION_EADC_1>

Keeping the unique UCITS brand and preserving its good reputation. Although modernizing the EAD is welcomed and needed, we urge Esma, when investigating possible exposure to certain assets, to keep in mind that UCITS is a success partly due to its simplicity and comprehensibility. Developing a common understanding and regulatory convergence across nations should, in our view, have a higher priority than enabling access to a wider scope of instruments. From an investor protection perspective, the larger number of eligible instruments available, the harder it is to keep a common understanding of the UCITS.

<ESMA_QUESTION_EADC_1>

Q2 Have you experienced any recurring or significant issues with the interpretation or consistent application of UCITS EAD rules 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.

<ESMA_QUESTION_EADC_2>

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<ESMA_QUESTION_EADC_2>

Q3 Have you experienced any recurring or significant issues with the interpretation or consistent application of UCITS EAD rules with respect to money market instruments? 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.

<ESMA_QUESTION_EADC_3>

Regarding the definition of money market instruments, it should be made clear that money market instruments should have an interest risk and a credit risk that corresponds to the money market.

In Article 3.2, money market instruments are defined, i.a. as instruments that have a residual maturity of no more than 397 days or undergo yield adjustments at least every 397 days. This can be understood as an obligation to classify bonds with a remaining maturity of no more than 397 days as money market instruments. Even FRNs, which are bonds with often quarterly yield adjustments, would thus be classified as money market instruments. It can also be perceived as an obligation to reclassify bonds from transferable securities to money market instruments when the remaining maturity is below 397 days. This creates problems because the regulations for transferable securities and money market instruments are different. It also does not appear correct to categorize a high yield bond as a money market instrument, and it may be misleading to clients.

Instead, it should be made clear that the interest rate and credit risk should be taken into account in the classification.

<ESMA_QUESTION_EADC_3>

Q4 Have you experienced any recurring or significant issues with the interpretation or consistent application of UCITS EAD provisions 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.

<ESMA_QUESTION_EADC_4>

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<ESMA_QUESTION_EADC_4>

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. 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.

<ESMA_QUESTION_EADC_5>

In a UCITS there may only be assets that are liquid (Article 1.2.a of the UCITS Directive). In the last paragraph of Article 2.1 of the UCITS EAD, it is stated that financial instruments that are admitted to or dealt in on a regulated market may be presumed to be liquid "unless there is information available to the UCITS that would lead to a different determination". What is meant by "there is information available to the UCITS that would lead to a different determination " is not clear.

The presumption applies to instruments that are traded both on a regulated market and on an MTF. In Esma's questions and answers (Esma 34-43-392, 3 February 2023, Section I, Question 3) it is stated that as regards instruments that are traded on an MTF, the UCITS must actively seek and review information in order to ensure that the asset is liquid and negotiable. However, this is not clear from the EAD.

The EAD should be updated with clearer requirements on what is required of the fund company to examine the liquidity of an asset.

<ESMA_QUESTION_EADC_5>

Q6 Please explain your understanding of the notion of ancillary liquid assets 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.

<ESMA_QUESTION_EADC_6>

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<ESMA_QUESTION_EADC_6>

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? Where relevant, please distinguish between direct and indirect investments.

<ESMA_QUESTION_EADC_7>

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<ESMA_QUESTION_EADC_7>

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? 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.

<ESMA_QUESTION_EADC_8>

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<ESMA_QUESTION_EADC_8>

Q9 Are the ‘transferable security’ criteria set out in the UCITS EAD 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.

<ESMA_QUESTION_EADC_9>

The notion “negotiable” in art 2.1(e) is not clear enough, but it needs to be clarified and better aligned with other notions being confusingly alike. For instance, EAD uses “freely transferable” in art 5.1(c), and MIFID uses “negotiable on the capital market” in art 4.1(44)-(45) and “freely negotiable” in art 51.1.

In many cases parallels are drawn between different EU regulatory regimes (such as UCITS and MIFID) as there may be an intention to make competitive and comparable the different wrappers of financial services. Currently, there is uncertainty whether there is an intended difference between these slightly different notions, or whether they are intended to be meaning one and the same thing. Specifically in regards of the notion “negotiable” in art 2.1(e), this has caused different implementation across national markets as well as across competitors in one and the same market. As a consequence, fund managers are facing a non-level playing field, in the sense that some managers are permitted to invest in assets which are non-permitted for others.

“Negotiable on the capital market” could be interpreted to permit only those assets which are vested or ready for trading on a regulated market. “Negotiable”, alone, could be interpreted to allow all assets that can theoretically and technically be sold by a holder to a purchaser, even if the asset would entail some features which would disqualify it from being admitted to trading on a regulated market. “Freely transferable” leaves it up to interpretation of which are the features the asset shall be free of, and it is uncertain whether this has the same meaning as “freely negotiable”.

Presumably, the difference in the notions used is intended. However, in the different national markets, application and implementation of these notions have differed. Therefore, a clarification would be needed in art 2.1(e), for instance with this sort of an amendment:

“(e) they are negotiable in the sense that ownership can be transferred from one party to another party;”

<ESMA_QUESTION_EADC_9>

Q10 How are the valuation and risk management-related criteria set out in the UCITS EAD 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.

<ESMA_QUESTION_EADC_10>

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<ESMA_QUESTION_EADC_10>

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? 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.

<ESMA_QUESTION_EADC_11>

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<ESMA_QUESTION_EADC_11>

Q12 Is the concept of « embedded » derivatives set out in the UCITS EAD 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.

<ESMA_QUESTION_EADC_12>

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<ESMA_QUESTION_EADC_12>

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.

<ESMA_QUESTION_EADC_13>

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<ESMA_QUESTION_EADC_13>

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 and (2) the provisions on UCITS investments in closed ended funds set out in the UCITS EAD? 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 in 2011.

<ESMA_QUESTION_EADC_14>

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<ESMA_QUESTION_EADC_14>

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.

<ESMA_QUESTION_EADC_15>

A UCITS may include shares in open-ended funds. Unless these open-ended funds are UCITS, a number of requirements are placed on the funds in order for them to be eligible assets (Article 50.1.e of the UCITS Directive). If, on the other hand, the funds are closed, they may be treated as transferable securities. From Article 2.2 of the EAD, it appears that these must be closed-end funds (which have been formed as investment companies, under unit trust legislation or the law of contract).

It is a big problem for the market that the requirements limit the possibility of investing in US ETFs. Investments in such funds gives cost-effective exposure to the American market. Instead of investing directly in US securities, a mutual fund can obtain equivalent exposure by investing in an ETF. However, such ETFs cannot be classified as transferable securities because they are not fully closed; fund units are issued to so-called market makers. It has also proven difficult to classify the ETFs under the definition of fund shares in the UCITS directive, i.a. because they do not submit a half-yearly report. The consequence of UCITS not being able to gain exposure to the US market through ETFs is to the detriment of investors and a competitive disadvantage for UCITS.

From an investor protection perspective, it appears illogical that closed-end funds, portfolios etc. traded on a marketplace are eligible assets – regardless of the underlying assets – while an ETF containing such assets in which a UCITS may invest directly would not be an eligible asset. In this context, it should be noted that the fact that a fund is open for redemption is not a disadvantage from an investor's perspective.

Article 2 of the EAD should therefore be amended so that ETFs also can be included in the concept of transferable securities.

<ESMA_QUESTION_EADC_15>

Q16 How would you propose to amend the UCITS EAD 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; (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.

<ESMA_QUESTION_EADC_16>

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<ESMA_QUESTION_EADC_16>

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) set out in the SFTR? 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?

<ESMA_QUESTION_EADC_17>

Yes, we would see merit in linking, replacing and/or clarifying the notions EPM and SFT. It is currently not clear enough whether they differ or are equal.

<ESMA_QUESTION_EADC_17>

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, EMIR, Benchmark Regulation and MMFR? 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.

<ESMA_QUESTION_EADC_18>

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<ESMA_QUESTION_EADC_18>

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.

<ESMA_QUESTION_EADC_19>

-National limits on securities lending

The Swedish Financial Supervisory Authority (Finansinspektionen) have adopted a 20 percent limit on portfolio lending (a maximum of 20 % of the fund's assets may be used). This leads to a competitive disadvantage for Sweden registered funds, especially for index funds where this is important for efficient portfolio management (EAD article 11 b, reduction of costs/generation of additional income).

<ESMA_QUESTION_EADC_19>

Q20 Please fill in the table in the Annex to this document on the merits of allowing direct or indirect UCITS exposures to the asset classes listed therein, taking into account the instructions provided in the same Annex. 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). 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.

<ESMA_QUESTION_EADC_20>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_EADC_20>

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.

<ESMA_QUESTION_EADC_21>

Certificates/structured securities:

It is unclear how the transparency works. In one attention-grabbing problem with funds in Swedish premium pension system, a fund owned certificates that gave a return that was dependent on an actively managed portfolio with e.g. unlisted holdings. It appears to have been a way of circumventing the rules around eligible assets and created great opportunities for fraud (connections between the fund company and the issuer of the certificates). Clarifications in the EAD could be needed to ensure transparency when funds buy certificates/structured products.

OTC Derivatives including total return swaps:

It is very difficult for an investor to look-through and see what they will get in return and what built-in costs there are, i.e., the yield obtained, it is unclear how it is adjusted for costs and fees. For example, in a OTC-contract the swap counterparty pays a "index-return" to the fund (and hence to the investor) but it is not transparent what the index-return exactly constitutes: net of which costs, net of which taxes and so on. The total return swap is normally an eligible asset but the information on what it actually returns could need further clarifications to the investor. ETPs and OTC instruments, including total return swaps should only be eligible if they are transparent and have a full disclosure on costs.

<ESMA_QUESTION_EADC_21>

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 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.

<ESMA_QUESTION_EADC_22>

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<ESMA_QUESTION_EADC_22>

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.

<ESMA_QUESTION_EADC_23>

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<ESMA_QUESTION_EADC_23>

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.

<ESMA_QUESTION_EADC_24>

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<ESMA_QUESTION_EADC_24>

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.

<ESMA_QUESTION_EADC_25>

The concept of “cash positions” in the context of calculating Global Exposure

When calculating Global Exposure using the Commitment Approach, the CESR’s Guidelines (on Risk Measurement and the Calculation of Global Exposure and Counterparty Risk for UCITS, CESR/10-788) states in Box 4 that a financial derivative instrument is not to be taken into account when (for example) “The combined holding by the UCITS of a financial derivative instrument relating to a financial asset and cash which is invested in risk free assets is equivalent to holding a cash position in the given asset.” The explanatory text gives an example where the term “cash position” is used. Despite this, The Swedish Financial Supervisory Authority (Finansinspektionen) has concluded that in the exposure calculation for a financial derivative can be netted against “cash which is invested in risk free assets” but not against a “cash position”. This has forced some management companies to use the (more complex and hence expensive VaR-calculation instead of the more suitable commitment approach.

<ESMA_QUESTION_EADC_25>