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Additional Information

Level 1 Regulation
Undertakings for Collective Investment in Transferable Securities Directive (UCITS) Directive 2009/65/EC

Level 2 Regulation
UCITS - Directive 2010/43/EU on organisational requirements, conflicts of interest, conduct of business, risk management and content of the agreement between a depositary and a management company

Topic
Costs and fees

Additional Legal Reference
Question related to Articles 22 and 29 Directive 2010/43/EU (UCITS level 2)

Subject Matter
Fee rebate arrangements

Question

Do you agree that:
(i) restrictions under Article 29 of the Commission Directive 2010/43/EU shall not be applicable to a rebate arrangement, if management companies pay these rebates from their own resources (payment vis-à-vis an individual investor)?
(ii) management companies may pay fees from their own resources to separate investors (e.g. by concluding side letters with institutional investors, which buy investment fund units on behalf of their clients), where management companies prevent undue costs being charged to the UCITS and its unit-holders?

ESMA Answer

01-11-2021

Original language

[ESMA 34-43-392 UCITS Q&A, Section 12, 1a]

Answer provided by the European Commission in accordance with Article 16b(5) of the ESMA Regulation[1]

No.

Article 29 of Commission Directive 2010/43/EU[2] lays down strict conditions for fees or commissions paid or received to/from a third party in relation to the activity of investment management and administration of the UCITS. Those conditions ensure that management companies act honestly, fairly and professionally. In particular, they ensure UCITS best interests, investors' fair treatment and the transparency of UCITS operations.

Management fee discount arrangements entail payments to certain investors based on the fees charged by the UCITS management companies to remunerate investment management and/or administration activities. As such, they should be analysed as payments for the activity of the investment management and administration of the UCITS. Therefore, management companies shall ensure that the conditions laid down in Article 29(1)(b) of Commission

Directive 2010/43/EU are satisfied:

- “(i) the existence, nature and amount of the fee, commission or benefit, or, where the amount cannot be ascertained, the method of calculating that amount, must be clearly disclosed to the UCITS in a manner that is comprehensive, accurate and understandable, prior to the provision of the relevant service;
- (ii) the payment of the fee or commission, or the provision of the non-monetary benefit must be designed to enhance the quality of the relevant service and not impair compliance with the management company’s duty to act in the best interests of the UCITS;”

It follows from the above that, in particular:

- (a) those arrangements should be transparent and meet the conditions laid down in Article 29(1)(b) of Commission Directive 2010/43/EU;
- (b) management companies should demonstrate that:
    - (i) these arrangements will “enhance the quality of the relevant service” for the UCITS. That requirement refers to the quality of the UCITS services to the benefit of all investors and not only to investors who benefit from those arrangements;
    - (ii) those arrangements will “not impair compliance with the management company’s duty to act in the best interests of the UCITS”. In particular, Article 22 of Commission Directive 2010/43/EU sets out rules related to the “Duty to act in the best interests of UCITS and their unit-holders”. Under that Article, management companies are bound to treat all unit-holders fairly, act in the best interest of the unit-holders and to refrain from placing the interest of any group of unit-holders above others. Therefore, management companies should be able to justify that all investors pay their fair share in the funds functioning (taking into account management fee discount) and the UCITS cost structure. Those arrangements should not have a negative impact on other investors.

Upon national competent authorities’ request, management companies should be able to provide accurate and documented justifications.

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[1] The answers provided by the European Commission clarify provisions already contained in the applicable legislation. They do not extend in any way the rights and obligations deriving

from such legislation nor do they introduce any additional requirements for the concerned operators and competent authorities. The answers are merely intended to assist natural or legal persons, including competent authorities and Union institutions and bodies in clarifying the application or implementation of the relevant legal provisions. Only the Court of Justice of the European Union is competent to authoritatively interpret Union law. The views expressed in the internal Commission Decision cannot prejudge the position that the European Commission might take before the Union and national courts.

[2] Commission Directive 2010/43/EU of 1 July 2010 implementing Directive 2009/65/EC of the European Parliament and of the Council as regards organisational requirements, conflicts of interest, conduct of business, risk management and content of the agreement between a depositary and a management company (OJ L 176, 10.7.2010, p. 42).