



European Securities and
Markets Authority

Reply form for the Technical Advice the on delegated acts required by the UCITS V Directive





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Markets Authority

Date: 26 September 2014

Responding to this paper

The European Securities and Markets Authority (ESMA) invites responses to the specific questions listed in the ESMA Consultation Paper - ESMA's technical advice to the European Commission on delegated acts required by the UCITS V Directive, published on the ESMA website ([here](#)).

Instructions

Please note that, in order to facilitate the analysis of the large number of responses expected, you are requested to use this file to send your response to ESMA so as to allow us to process it properly. Therefore, please follow the instructions described below:

- i. use this form and send your responses in Word format;
- ii. do not remove the tags of type < ESMA_UCITS_QUESTION_1> - i.e. the response to one question has to be framed by the 2 tags corresponding to the question; and
- iii. if you do not have a response to a question, do not delete it and leave the text "TYPE YOUR TEXT HERE" between the tags.

Responses are most helpful:

- i. if they respond to the question stated;
- ii. contain a clear rationale, including on any related costs and benefits; and
- iii. describe any alternatives that ESMA should consider

Given the breadth of issues covered, ESMA expects and encourages respondents to specially answer those questions relevant to their business, interest and experience.

To help you navigate this document more easily, bookmarks are available in "Navigation Pane" for Word 2010 and in "Document Map" for Word 2007.

Responses must reach us by **24 October 2014**.

All contributions should be submitted online at www.esma.europa.eu under the heading 'Your input/Consultations'.

Publication of responses

All contributions received will be published following the end of the consultation period, unless otherwise requested. **Please clearly indicate by ticking the appropriate checkbox in the website submission form if you do not wish your contribution to be publicly disclosed. A standard confidentiality statement in an email message will not be treated as a request for non-disclosure.** Note also that 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 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 'Disclaimer'.

III. Advice on the insolvency protection of UCITS assets when delegating safekeeping (Art. 22a(3)(e)¹ and 26b(e) UCITS V)

Q1: Do you agree that the steps to be taken by the third party are ultimately intended to ensure that the level of segregation foreseen under 22a(3)(d) of the UCITS Directive is recognised in the context of an insolvency proceeding involving the third party?

<ESMA_UCITS_QUESTION_1>

(The European Trustee and Depositary Forum ('ETDF') was established in 2008 to represent the interests of EU Member State depositaries of Collective Investment Schemes (covering both harmonised funds (i.e. UCITS) and non-harmonised funds). ETDF currently includes professionals representing national depositary associations from France, Germany, Ireland, Luxembourg, Spain, Austria, the UK and Italy)

Yes.

It is worth highlighting that confusion can arise from the use of the term in regulatory papers as a 'third party' where sub-delegation takes place. In the UCITS Directive, the meaning of a third party is clear. Given the wording of Art 22a and the last paragraph of 22a(3), ETDF understands 'third party' to mean the party or parties which the depositary appoints as custodian. If that custodian (the 'third party') then delegates to another party, that relationship is captured by the last paragraph of 22a(3) and the third party has to ensure that its sub-delegates meet all the requirements of Art 22a(3). ETDF's response is based upon this understanding.

<ESMA_UCITS_QUESTION_1>

Q2: Do you consider that the level of segregation foreseen under Art 22a(3)(d) of the UCITS Directive should protect UCITS assets from claims by creditors of an insolvent third party which had been delegated the safekeeping of the assets by the UCITS' depositary?

<ESMA_UCITS_QUESTION_2>

Yes it should. It is, however, subject to any developments in insolvency laws and jurisprudence. Therefore, ETDF also strongly recommends that ESMA and the EU Commission pursue the goal of achieving harmonisation at an International level (i.e. IOSCO level) of the insolvency laws in third country jurisdictions so as to deliver effective asset segregation and protection.

<ESMA_UCITS_QUESTION_2>

Q3: Are there other measures which could also help achieve this objective?

<ESMA_UCITS_QUESTION_3>

Whilst ETDF agrees with the ESMA advice, it believes the proposed steps are not sufficient. ETDF strongly recommends that ESMA develops guidelines for Depositaries, Management Company/UCITS Board and Competent Authorities on the action that should be taken in the event that the depositary makes a notification that it has become aware that the applicable insolvency laws and jurisprudence no longer guarantees the segregation of UCITS assets in the event of the insolvency of the entity holding the financial instruments.

In the event where the local law no longer recognises segregation on insolvency we would suggest the following:

¹ Article 22a(3)(d) in the text of UCITS V published in the Official Journal.

a) The depositary shall notify the Management Company or UCITS, if self-managed, and the UCITS's Competent Authority as soon as is practicable after it becomes aware of the change in local law.

b) The relevant Competent Authority shall have measures in place to ensure that the Management Company or UCITS, if self-managed, takes appropriate and prompt action (and for such action to be supervised by the Competent Authority of the UCITS) and where relevant to immediately sell the assets because in most instances it would be impossible for a depositary to locate an alternative sub-custodian or local agent if there is an issue in a particular market. Indeed a security is issued by an entity in a country where it is located and it is not possible for the depositary to select a third party which is not located in this country . A transfer of assets to another country is not a realistic protective measure. This will typically not be feasible at all (e.g. the assets are ultimately held by a local CSD of which only local sub-custodians can be members) as the assets ultimately are held in any case in the original jurisdiction because this will be required in order to trade the assets. Therefore ETDF believes that there would be only two ways to meet the level 1 text requirement (i.e. assets held in custody are not entrusted to a third party subject to an insolvency law which does not recognize the effects of segregation) : i) to dispose of these securities or , ii) these securities should be converted from a bearer form to a registered form (a security that is registered in the books of the issuer in the name of the owner).

In the event of a loss of a financial instrument due to the local law not recognising segregation on insolvency, we do not believe the depositary's liability under Article 24 of Directive 2014/19/EU should be triggered because in line with the wording of Article 101(i)(c) of AIFMR, we believe that the depositary could not have reasonably prevented the occurrence of the event which led to the loss despite adopting all precautions incumbent on a diligent depositary as reflected in common industry practice.

It should not be unreasonable to expect the Competent Authority to have a responsibility to ensure that the Management Company/UCITS Board is acting in a manner that is not going to cause investor detriment or potentially create greater systemic risk. That would be more consistent with the current arrangements for the roles and responsibilities of public agencies charged with overseeing markets including funds.

The above approach recognises the fiduciary role of the Management Company/UCITS Board. It, rather than the depositary, is responsible for making investment decisions for the UCITS and must take swift steps to act upon the information received from the depositary. Immediately upon receipt of such notification, there should be a burden of proof upon the Management Company/UCITS Board to demonstrate that any steps it takes are taken in the best interests of the UCITS.

If this is not the case, it leaves a depositary with open-ended liability until such time as it is able to terminate the contract in respect of something it has made all reasonable efforts to address.

<ESMA_UCITS_QUESTION_3>

Q4: Do you agree with the steps to be taken by the third party as identified above? If not, please explain the reasons.

<ESMA_UCITS_QUESTION_4>

Yes ETDF does. However for the sake of clarity, ETDF recommends that the draft advice includes a paragraph to the effect that if the third party to whom the depositary has delegated functions referred to in

Art 22(5), in turn sub-delegates those functions, such sub-delegation should be subject to the same requirements (i.e. application mutatis mutandis). Whilst this is already the case by virtue of the last paragraph of Art 22a(3), it would be helpful for it to be included in L2 measures. This would also be consistent with the approach taken in AIFMR (e.g. Art 98(4)).

It is not uncommon for a depositary to delegate custody to a Global Custodian (the third party) who, in turn, may delegate to other parties. The clarity mentioned regarding a third party sub-delegating, above would therefore be helpful. In addition specific means such as the obtaining of a legal advice from independent legal counsel should be recommended but not prescribed, where, depending on the circumstances, the assessment of the depositary's internal legal services may be an alternative.

<ESMA_UCITS_QUESTION_4>

Q5: Do you consider that there are any specific difficulties that may arise in verifying the applicable insolvency regime that makes the proposed rules difficult to be complied with? In particular, do you consider the requirement for the third party located in a jurisdiction outside the Union to obtain independent legal advice could give rise to specific issues?

<ESMA_UCITS_QUESTION_5>

Yes ETDF does. It may depend upon how complex the applicable insolvency regime is, whether there is an existing jurisprudence or how certain the legal advice is. It is important to note that the risk of loss of assets in insolvency proceedings by a third party cannot be completely alleviated. As pointed out by IOSCO (in the recent Recommendations Regarding the Protection of Client Assets issued by IOSCO in January 2014 (the "IOSCO Recommendations"), ETDF would like to remind ESMA that the ultimate regulatory and market risk of each domestic securities market remains and is beyond the control of the depositary. As IOSCO stresses, "where assets are held in foreign jurisdictions, there may be specific country risks that should be taken into account, e.g. the effectiveness of the local regulatory regime, whether a judgement can be enforced effectively and other factors that make it difficult to repatriate CIS assets²" – factors for which clearly we believe the depositary as well as any appointed third party have no influence on.

There are many difficulties such as:

- Insolvency regimes are based on legal concepts which are not necessarily comparable in nature and whose assessment may prove difficult;
- Legal regimes do not always warrant the actual enforcement before the courts;
- The evaluation of the insolvency regimes may vary between legal advisers as this may be subject to interpretation;
- Quality legal advice might not always be available in all jurisdictions to the extent needed in this context;
- Independent legal advice is not necessarily more desirable, especially where in-house legal advice is available, notably for depositaries which have a local presence in the markets at stake;
- Finally, a legal advice is only valid as on its issuance and may not foresee future developments which may be sudden.

It is also important to be clear what entity constitutes the 'third party'. In response to Q4, ETDF recommends that the draft advice includes a paragraph to the effect that if the third party to whom the depositary has delegated functions referred to in Art 22(5), in turn sub-delegates those functions, such sub-delegation is subject to the same requirements. Whilst this is already the case by virtue of the last paragraph of Art 22a(3), it would be helpful for it to be included in L2 measures. This would also be consistent with the approach taken in AIFMR (e.g. Art 98(4)).

<ESMA_UCITS_QUESTION_5>

Q6: Do you expect a significant increase in terms of costs that would be faced by the third party delegated entities located in jurisdictions outside the Union in order to

obtain independent legal advice on the applicable insolvency regime? If yes, please provide any available data and/or estimation.

<ESMA_UCITS_QUESTION_6>

Yes ETDF does. Costs will increase and could be substantial. The legal advice will be needed for any jurisdiction outside the Union where financial instruments are held in custody.

<ESMA_UCITS_QUESTION_6>

Q7: Would you suggest requiring the third party to take any further steps which are not foreseen in the draft advice?

<ESMA_UCITS_QUESTION_7>

No ETDF would not.

<ESMA_UCITS_QUESTION_7>

Q8: Should any specific consideration be given to the scenario where the third party further sub-delegates the safe-keeping of the UCITS' assets in accordance with Article 22a(3), last sub-paragraph of the UCITS Directive (as inserted by UCITS V)? Should the third party take any additional/different steps or measures in this case?

<ESMA_UCITS_QUESTION_8>

Yes ETDF does. Please see answers to questions 4, 5 and 7. ETDF recommends that the draft advice includes a paragraph to the effect that if the third party to whom the depositary has delegated functions referred to in Art 22(5), in turn sub-delegates those functions, such sub-delegation is subject to the same requirements. Whilst this is already the case by virtue of the last paragraph of Art 22a(3), it would be helpful for it to be included in L2 measures. This would also be consistent with the approach taken in AIFMR (e.g. Art 98(4)).

<ESMA_UCITS_QUESTION_8>

Q9: Do you agree with the steps to be taken by the depositary as identified above? If not, please explain the reasons.

<ESMA_UCITS_QUESTION_9>

Please see the response to Q3 above.

<ESMA_UCITS_QUESTION_9>

Q10: Do you expect any significant one-off and ongoing compliance costs for depositaries in order to take the steps identified above? If yes, please provide any available data and/or estimation.

<ESMA_UCITS_QUESTION_10>

Yes ETDF does as there is a resultant need to review and change contracts-both as between the depositary and the third party, and between the third and any entity to which it delegates custody.

<ESMA_UCITS_QUESTION_10>

Q11: Would you suggest requiring the depositary to take any further steps which are not foreseen in the draft advice?

<ESMA_UCITS_QUESTION_11>

Yes ETDF does. Please see answers to Q 3 and 9.

<ESMA_UCITS_QUESTION_11>

Q12: Which measures do you think should be taken by the depositary and/or the investment company/management company in the best interest of the investors once

the depositary has informed the investment company or the management company on behalf of the UCITS that the segregation of the UCITS' assets in the event of insolvency of the third party is no longer guaranteed in a given jurisdiction located outside the Union? Would the transfer of the relevant UCITS' assets held by the third party in a non-EU jurisdiction to another (EU or non-EU) jurisdiction which recognises the segregation of the UCITS' assets in the event of insolvency of the third party/depositary be a possible measure?

<ESMA_UCITS_QUESTION_12>

Please see the response to Q3

<ESMA_UCITS_QUESTION_12>

IV. Advice on the independence requirement (Art. 25(2) and 26(b)(h) UCITS V)

Q13: Do you agree with the identified links that may jeopardise the independence of the Relevant Entities? If not, please explain the reasons.

<ESMA_UCITS_QUESTION_13>

ETDF agrees that some common management/supervision may to a certain extent, interfere with the independence of the Relevant Entities. Please see ETDF 's answer to Q15.

ETDF is concerned that the outright prohibition of cross-shareholdings/group inclusion, goes far beyond the objectives set out in the level 1 of the UCITS V directive, and ETDF is convinced that proposing recommendations based only on this will not achieve the final objective of higher investor protection but will rather lead to disproportionate costs and have a substantive impact on the existing shareholding structures of management companies and depositaries in Europe (see ETDF answer to Q22).

In the light of Level 1 provisions, ESMA should bear in mind that the requirement to act independently does not coincide with requiring the "structural" independence of the Relevant Entities. *This functional independence may be achieved in a variety of ways provided each is appropriate to the broader regulatory framework of the relevant jurisdiction. Functional independence as a minimum requirement is to be distinguished from a structural or "legal independence". According to principle 25 of the IOSCO Principles (in the recent Recommendations Regarding the Protection of Client Assets issued by IOSCO in January 2014 (the "IOSCO Recommendations")), it is not even mandatory for the custodian and the responsible entity to be legally separate entities or for the custodian and the responsible entity to not have common shareholders or directors, although it is open to the regulatory regime to prohibit or restrict this.* In this sense, and to avoid the risk that the future relative delegated acts reach beyond the Level 1 text, the conditions and criteria for fulfilling the independent action requirement mentioned therein should not be construed as ones requiring profound changes in corporate and group governance, structure, organization and internal processes, and shareholder links. Rather, the focus of ESMA's advice to the Commission in this regard should be made on conduct rules and possible sanctions, aiming at identifying, managing and disclosing eventual conflicts of interest to investors and achieving consistency with the existing European rules on the matter (e.g. CRD IV).

Thus ETDF urges ESMA to propose final recommendations that are strictly proportionate to the objectives to be achieved. Indeed, the principle of proportionality is intended to ensure that regulatory measures go no further than is required to achieve a set objective, which is to ensure that both the management company and the depositary have specific safeguards against conflicts of interest to allow for the independent performance of their activities. This is the reason why ETDF strongly disagrees with the cross-shareholdings/group inclusion as identified links which may jeopardise the independence of the Relevant Entities where a robust and effective conflict of interest policy is in place consistently with existing regulations (e.g. CRD IV) .

Many financial groups, amongst them the largest, have developed asset management and depositary businesses which represent a significant share of the global market of depositaries of UCITS. This is indeed a common practice in many European Member States, where financial groups are active both in asset management and depositary activities, providing a full range of services to UCITS funds. The prohibition of cross-shareholding (1st option) would lead to substantive additional costs as it would imply the separation of a large number of entities, in several Member States with a significant share of the UCITS market such as France , Germany, Luxembourg, Spain ,Belgium, Denmark, Sweden and partially in Italy .

ETDF strongly believes that this long established market practice should not be restricted by any level – 2 measures for the following reasons:

1. The absence of evidenced market failure: recent events affecting UCITS, such as the Madoff fraud were not connected to circumstances where the asset management companies and funds depositaries belonged to the same financial group. However, it was recognised that a better clarification and harmonisation of depositary duties and liability regime was necessary. These issues were adequately addressed in the AIFMD. The AIFM level1 and level 2 establish strict requirements with regard to oversight duties, asset segregation, due diligence, and the liability regime for depositaries. In addition, AIFMD Article 21 4 (a) provides that an AIFM shall not act as a depositary.
2. The new UCITS regulatory framework will provide investors with a greater level of protection:
 - a. The strict liability regime of the depositary in UCITS V goes even further than AIFMD as the depositary's liability can, in no circumstances, be contractually waived. Depositaries are regulated entities, must comply with stringent eligibility criteria and are subject to ongoing supervision. Article 5 of the current UCITS IV Directive, requires that *“The competent authorities of the UCITS home Member State shall not authorise a UCITS if the directors of the depositary are not of sufficiently good repute or are not sufficiently experienced also in relation to the type of UCITS to be managed (.....) . Directors shall mean those persons who, under the law or the instruments of incorporation, represent the depositary, or who effectively determine the policy of the depositary.”*
 - b. Depositaries are required to have in place and implement strict and detailed internal procedures for the prevention of conflicts of interest. They are also subject to a regular internal control process for the adequacy of resources and competences.
 - c. In addition, for depositaries subject to MIFID, MIFID reporting obligations include; on an annual basis, specific reporting on the safeguard of assets performed by an independent audit firm.

<ESMA_UCITS_QUESTION_13>

Q14: Do you consider that any additional links should be taken into account such as, for instance, the existence of any contractual commitment or other relationship which would affect the independence of the Relevant Entities? If yes, please provide details.

<ESMA_UCITS_QUESTION_14>

These commitments/relationships could be dealt with through a management company's/investment company's/depositary's normal processes and procedures for dealing with conflicts of interest so they do not need to be dealt with separately. In addition it is likely that a regulation may not draw an exhaustive list of all cases. ETDF would therefore propose to concentrate on the principles.

<ESMA_UCITS_QUESTION_14>

Q15: Do you consider that the cumulative presence of all or some of the identified links is necessary to jeopardise the independence of the Relevant Entities or the presence of any of these links is sufficient to determine a lack of independence?

<ESMA_UCITS_QUESTION_15>

ETDF is of the opinion that a certain level of common management/supervision, may to a certain extent, interfere with the independence of the Relevant Entities. However the conflict with other legislative provisions (corporate governance measures provided by national, and with Art. 91 (4) of CRD IV Directive) will have to be addressed .

In contrast ETDF believes the cross-shareholdings/group inclusion links cannot pre-determine a lack of independence of the Relevant Entities. Potential conflicts are mitigated by means of functional and hierarchical separation of performance of the depositary function (tasks) from other potential conflicting tasks. Furthermore, whenever potential conflicts of interests are identified they are managed, monitored and adequately disclosed to unitholders via the prospectus of the UCITS or by other means.

<ESMA_UCITS_QUESTION_15>

Q16: Do you agree with the proposed option to ensure the separation of the management bodies/bodies in charge of the supervisory functions of the Relevant Entities?

Do you have any alternative options to suggest, taking into account those identified under paragraph 47?

<ESMA_UCITS_QUESTION_16>

ETDF agrees with the proposed option to ensure the separation of the management bodies/bodies in charge of the supervisory functions of each entity by prohibiting any member of the management body of one of the relevant entities from also being a member of the management body or employee of the other relevant entity.

<ESMA_UCITS_QUESTION_16>

Q17: Do you consider that the cap of one third of members of the body in charge of the supervisory functions of one of the Relevant Entities to also be members of the management body, the body in charge of the supervisory functions or employees of the other Relevant Entity is appropriate? Would you suggest any alternative percentage? If yes, please provide the reasons why.

<ESMA_UCITS_QUESTION_17>

ETDF agrees that there should be a less stringent rule for the members of the body in charge of the supervisory functions for entities, which have a dual structure (i.e. the body in charge of the supervisory functions is different from the body in charge of the managerial functions). ETDF believes that there should be a cap which should not be higher than the cap of one third of members of the body in charge of the supervisory functions of one of the Relevant Entities to also be members of the management body, the body in charge of the supervisory functions or employees of the other Relevant entity. In addition ETDF believes that ESMA should avoid fixing any percentage which could result in conflict with other existing legislative regulation on corporate governance (included Art. 91 (4) of CRD IV Directive)-

<ESMA_UCITS_QUESTION_17>

Q18: Do you have knowledge of any restructuring in the composition of the management bodies/bodies in charge of the supervisory functions of any Relevant Entities that would be triggered by the identified option? If yes, please provide data and an estimation of the one-off and ongoing costs that would be incurred.

<ESMA_UCITS_QUESTION_18>

Comparing to both options on cross-shareholding, the implementation of the common management / supervision option is likely to lead to limited additional costs.

<ESMA_UCITS_QUESTION_18>

Q19: Which of the two identified options do you prefer? Would you suggest any alternative option? If yes, please provide details.

<ESMA_UCITS_QUESTION_19>

ETDF finds option 1 unacceptable and potentially destabilising for the banking industry in the EU. The principle of proportionality is intended to ensure that regulatory measures go no further than is required to achieve a set objective, which is to ensure that both the management company and the depositary have specific safeguards against conflicts of interest to allow for the independent performance of their activities.

ETDF would consider option 2 subject to some amendments as the preferred choice. Option 2 as robust management of conflicts of interest is effective in ensuring independence and this can observe the key European legislative principle of proportionality. However the reference to the composition of the management body of the management company/investment company and the depositary should be removed. Indeed, the principle of proportionality is intended to ensure that regulatory measures go no further than is required to achieve a set objective, which is to ensure that both the management company and the depositary have specific safeguards against conflicts of interest to allow for the independent performance of their activities.

Taking each aspect in turn, robust management of conflicts of interest lies at the heart of many Union Directives and Regulations relating to financial services (including other areas of the UCITS Directive and its Level 2 provisions). Effective conflicts management is a widely recognized regulatory measure for demonstrating independence of thought and action.

Proportionality is vital. As the ESMA consultation paper rightly identifies at paragraph 62, a prohibition (i.e. Option 1), might “*have a substantive impact on the existing shareholding structures of management companies/investment companies and depositaries in Europe*”. ETDF confirms that Option 1 would certainly have such an impact. Further information on the impact of Option 1 is covered in our response to Q 22. Apart from the potential costs, fundamentally changing European models is likely to lead to an increase in systemic risk. From a practical perspective too, the type of far-reaching structural changes to the European UCITS industry that Option 1 would necessitate is not realistically be achievable by the entry into force of UCITS.

If the Commission, Council and Parliament had had in mind a complete prohibition of the model operated in many European jurisdictions, ETDF is certain that such an intention would have been made explicit. ETDF firmly believes that, in adding simply that criteria be developed around the meaning of ‘independence’, these European bodies had in mind robust management of conflicts of interest as a means of demonstrating independence of thought and action.

In this regard, ETDF would also strongly support any work that ESMA might undertake to develop guidelines setting out its expectations on independence for supervisors (and the industry) so as to ensure a harmonised approach to the supervision of the independence requirement.

ETDF also considers it important that L2 measures should be applied in the same way throughout the Union. This implies that all Competent Authorities apply the same independence requirements and do not impose additional requirements upon local UCITS. Different requirements would lead potentially to different outcomes for investors depending upon the jurisdiction in which the UCITS is domiciled. Harmonisation of understanding would address this.

<ESMA_UCITS_QUESTION_19>

Q20: Under the second option, do you consider that it would be appropriate to require that – whenever the Relevant Entities are part of the same group – at least one third of the members of the management body of the management company/investment company and depositary should be independent? Would you suggest any alternative percentage? If yes, please provide the reasons why.

<ESMA_UCITS_QUESTION_20>

ETDF does not support the requirement of at least one third of the members of the management body of both entities should be independent. Robust management of conflicts of interest can deliver the independence required. This requirement would raise many practical issues, (in particular for small structures and structures with joint or multiple shareholdings). An additional operational hurdle would also be the regulatory limits imposed on the number of directorships held by directors.

Should independent directors be imposed, ETDF suggests limiting the number to 1, or 2. This arrangement would allow reaching the same objectives without unnecessary constraints

In addition ETDF believes that any fixed percentage would raise many practical issues, being potentially in conflict with other EU and national legislative provisions.

<ESMA_UCITS_QUESTION_20>

Q21: Do you agree that the concept of independence should be understood as requiring that independent directors should not be member of the management body or the body in charge of the supervisory function nor employees of any of the undertakings within the group?

<ESMA_UCITS_QUESTION_21>

No ETDF does not agree. The concept of Independence should not include members of the management body or employees of undertakings of the group, provided the undertakings are not the Depository, or the Management company.

<ESMA_UCITS_QUESTION_21>

Q22: Do you have knowledge of the impact that each of the two options identified would have in terms of restructuring the shareholding of any Relevant Entities or finding alternative service providers? If yes, please provide data and an estimation of the one-off and ongoing costs that would be incurred.

<ESMA_UCITS_QUESTION_22>

The prohibition of cross shareholding, as envisaged in option 1 (*“the management company company/investment company shall not be included in the same group...”*) may, if retained by ESMA, lead to 2 types of consequences, both significantly detrimental to the investors:

- European-based diversified financial groups with a depository arm will be compelled to limit their operations in asset management, thus depriving the market of a substantial part of the range of products available for investment for the retail market. A significant amount of UCITS would be closed and their assets could be transferred to other investment vehicles offering less protection.
- European-based diversified financial groups with an asset management arm will exit the depository sector. Depository service offering in the UE will therefore be reduced, be limited to fewer players (bringing with it the potential for systemic risk), and is likely to be offered by banks somewhat away from the asset industry constraints.

Option 1 would entail huge costs and a complete transformation of the existing models with a realistic possibility of putting at risk and weakening the overall sector. These costs would ultimately be borne by UCITS investors with no added benefits in terms of protection given the absence of evidenced market failure and given that Option 2 will deliver independence.

In term of asset under management please find below the percentage of the total UCITS AuM that would need to be transferred to another depository :

- In France :62%

- In Luxembourg : : 30.66 % (equally to € 755 484 million AuM) which is different from the estimate given in the ESMA impact assessment
- In Italy: 9 %
- In Spain: 70 %

But these costs would go far beyond the costs of transfer since option 1 would, in our view contradict, without any compelling grounds, the freedom of enterprise in the European financial and lead to a far reaching market restructuring detrimental to:

- 1) The employment in the financing sector,
- 2) The financing of the economy,
- 3) The stability and safety of the whole UCITS model and so to investors, and
- 4) The stability of the banking sector.

If Option 1 were to be pursued, a very rigorous cost/benefit analysis would need to be carried out. ETDF does not foresee any t benefits for the European funds industry and investors. Particularly when there is a readily available Union law-recognised solution for demonstrating independence (effective and robust management of conflicts) will deliver the investor protection outcome that that the UCITS Directive is designed to achieve. Option 2 is the right Option to pursue.

<ESMA_UCITS_QUESTION_22>

Annex III

Cost-benefit analysis

Q23: Do you agree with ESMA's approach to discard the second and third options described above?

<ESMA_UCITS_QUESTION_23>

ETDF agrees with ESMA's approach to discard the second and third option .

<ESMA_UCITS_QUESTION_23>