

OPINION

Article 50(2)(a) of Directive 2009/65/EC

1. Legal basis

1. ESMA's competence to deliver an opinion is based on Article 29(1) (a) of Regulation (EC) No 1095/2010 (the 'Regulation'). In accordance with Article 44(1) of the Regulation the Board of Supervisors has adopted this opinion.

2. Background

2. According to Article 1(2)(a) of Directive 2009/65/EC (the UCITS Directive), UCITS may invest in transferable securities and/or in other liquid financial assets referred to in Article 50(1).
3. Article 50(2)(a) of the UCITS Directive provides that UCITS may not invest more than 10% of their assets in transferable securities and money market instruments other than those referred to in Article 50(1) of the UCITS Directive. Questions have emerged about the correct interpretation of this Article and, in particular, whether the derogation in Article 50(2)(a) of the UCITS Directive applies to units or shares of collective investment undertakings as defined in Article 50(1)(e). To ensure uniform application of Article 50(2)(a) of the UCITS Directive, ESMA has taken the decision to publish a formal opinion on its interpretation.

3. ESMA's opinion

4. Article 50(2)(a) refers only to investments in transferable securities and money market instruments and not to units or shares of collective investment undertakings. In Article 50(1), only sub-paragraphs (a) to (d) include the expression "transferable security" and only sub-paragraph (h) includes the expression "money market instruments". It follows that Article 50(2)(a) provides for a derogation from sub-paragraphs (a) to (d) and sub-paragraph (h) of Article 50(1), and not from sub-paragraph (e).
5. Therefore, ESMA's opinion is that UCITS may only invest in units or shares of collective investment undertakings as defined in Article 50(1)(e) of the UCITS Directive.
6. ESMA expects that any portfolio adjustments required to ensure compliance with this opinion will be made taking into account the best interests of investors and at the latest by 31 December 2013.

Annex – Extracts from the UCITS Directive

Article 50(1)(e)

The investments of a UCITS shall comprise only one or more of the following:

[...]

(e) units of UCITS authorised according to this Directive or other collective investment undertakings within the meaning of Article 1(2)(a) and (b), whether or not established in a Member State, provided that:

(i) such other collective investment undertakings are authorised under laws which provide that they are subject to supervision considered by the competent authorities of the UCITS home Member State to be equivalent to that laid down in Community law, and that cooperation between authorities is sufficiently ensured;

(ii) the level of protection for unit-holders in the other collective investment undertakings is equivalent to that provided for unit-holders in a UCITS, and in particular that the rules on asset segregation, borrowing, lending, and uncovered sales of transferable securities and money market instruments are equivalent to the requirements of this Directive;

(iii) the business of the other collective investment undertakings is reported in half-yearly and annual reports to enable an assessment to be made of the assets and liabilities, income and operations over the reporting period; and

(iv) no more than 10 % of the assets of the UCITS or of the other collective investment undertakings, whose acquisition is contemplated, can, according to their fund rules or instruments of incorporation, be invested in aggregate in units of other UCITS or other collective investment undertakings;

Article 50(2)

A UCITS shall not, however:

(a) invest more than 10 % of its assets in transferable securities or money market instruments other than those referred to in paragraph 1; or

(b) acquire either precious metals or certificates representing them.

UCITS may hold ancillary liquid assets.