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](http://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](http://www.esma.europa.eu) under the heading ‘[Data protection](https://www.esma.europa.eu/about-esma/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.

# General information about respondent

|  |  |
| --- | --- |
| Name of the company / organisation | Irish Funds |
| Activity | Industry body |
| Country / Region | Ireland |

# Questions

1. 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>

Undertakings for Collective Investment in Transferable Securities Directive (“**UCITS**”) is the most important regulated investment fund product in Ireland. The global success of UCITS has delivered significant benefits to both European investors and Member State economies.  UCITS are particularly important to the Irish economy, as UCITS represent almost 80% of total fund assets in Ireland[[1]](#footnote-2), due in part to Ireland’s position as the largest Money Market Fund (“**MMF**”) and Exchange Traded Fund (“**ETF”**) domicile in Europe.

As regulated investment products, UCITS promote investor protection, market integration, harmonisation, and transparency. UCITS are designed for retail investors, to facilitate innovation and play an important role as part of the European Union’s (“**EU**”) Capital Markets Union and Retail Investment Strategy. For these reasons, Irish Funds supports the ongoing success of UCITS, a product with high levels of investor protection and opportunity for innovation.

The global reputation of the UCITS as an effective conduit for retail investors is built on being a secure, well-diversified, liquid, and transparent collective investment vehicle. The UCITS Directive has been a consistent regulation, which has allowed financial market participants (FMP) the opportunity to rely upon UCITS during periods of market turmoil and innovate in times of prosperity. For example, in April 2024, despite a dip in global stock markets, UCITS continued to attract strong net inflows in April. An analysis of the April 2024 data for Europe shows that UCITS attracted net inflows of EUR 35bn, long-term UCITS (UCITS excluding money market funds) saw net inflows of EUR 21bn, UCITS money market funds experienced net inflows of EUR 14bn, and UCITS ETFs recorded net inflows of EUR 13bn[[2]](#footnote-3). Such regulatory stability has contributed to the success of the UCITS, which continue to grow despite frequent changes in the market.

One of the most pressing issues to address in the UCITS EAD is supervisory convergence across the EU member states which could be achieved by the EAD and/or applicable Level 3 Guidance being amended to provide greater clarity regarding the criteria to be taken into account in assessing whether or not a class of financial instrument is covered by the various definitions within the UCITS Eligible Assets Directive. However, sufficient flexibility is needed to accommodate evolving financial markets which have already resulted and inevitably will further result in different types of financial instruments.

Certain National Competent Authorities (“**NCAs**”) have introduced an enhanced scrutiny process. The purpose of which Irish Funds understands is to scrutinise certain financial instruments, to determine:

1. whether the financial instrument is UCITS eligible;
2. whether the proposed level of investment in the relevant financial instrument can be appropriately managed (notwithstanding it is a regulatory obligation of the UCITS management company to monitor and measure the risks (including liquidity) of such instruments and their contribution to the overall risk profile of the portfolio of assets of the UCITS); or
3. whether the proposed level of indirect investment via the UCITS may give rise to retail investors being exposed to risks that are subject to specific regulatory measures or concerns regarding retail investor's ability to assess and understand the risks involved (notwithstanding a UCITS is professionally managed).

In most cases, the enhanced scrutiny process results in investment in such financial instruments being either prohibited or limited[[3]](#footnote-4).

This enhanced scrutiny process is insufficiently transparent in the context of the timeframe involved and rationale for decisions made (in particular where global asset manager(s) with expertise in the relevant financial instrument have provided data regarding liquidity, valuation information, safe keeping, etc.).

In most cases, the financial instruments that are the subject of the enhanced scrutiny process are instruments that historically have been invested in by UCITS (such as for example CoCos, CLOs, CMOs, CDOs, CFDs, binary options, etc.) without limitation, subject to the risk management framework of the UCITS management company which has a regulatory obligation to monitor and measure the risks of such investments (including liquidity) and their contribution to the overall risk profile of the portfolio of assets of the UCITS.

Irish Funds is concerned with the inclination to restrict (or forbid) even indirect exposure to an entire asset type based upon perceived higher risk despite (i) higher volatility being present in certain equity markets and (ii) market risk being managed through other restrictions like global exposure. As a result, Irish Funds would welcome clarity on a harmonised, agreed approach across the EU on the criteria for eligibility (i.e. is it the entire asset class that is not permitted or assets within that class that display certain characteristics).

Regarding the enhanced scrutiny process, the most pressing issue for the EAD is that there is currently no harmonised or transparent approach across Member States regarding the process itself, the timeframe involved and rationale for any prohibition / limitation on investment in the relevant financial instrument. This results in uncertainty regarding what investment strategies can be used in UCITS products for the benefit of investors and an unlevel playing field for UCITS domiciled in different Member States. Consequently, Irish Funds is not in favour of the enhanced scrutiny process.

Irish Funds does not support the restriction on asset classes that are eligible investments for UCITS. Once an asset qualifies as UCITS eligible then the selection of those UCITS eligible assets should be based upon the strategy of the fund, and that the investment manager is best placed to make this assessment subject to the ongoing oversight obligations in relation to liquidity and risk management. The strategy and alignment of assets are detailed in the pre-contractual and disclosure documents which are available to investors and regulators. However, Irish Funds recognises it is also important that the framework evolves to give equal consideration to both asset eligibility and overall product suitability factors. UCITS must evolve with the market to remain suitable and competitive.

Many of the asset classes identified in the European Securities and Markets Authorities[[4]](#footnote-5) Call for Evidence are available for retail investors to invest in directly without the diversification benefits and risk management afforded by investing via a highly regulated product such as a UCITS fund managed by suitably qualified professionals. For example, within the European Economic Area (“**EEA**”), a retail investor can avail of the execution-only services of a Markets in Financial Instruments Directive 2014 (“**MiFID**”) investment firm to purchase non-complex financial instruments without any assessment required on the part of the MiFID investment firm. Similarly, a retail investor can avail of the execution-only services of a MiFID investment firm to purchase complex financial instruments notwithstanding the MiFID investment firm must ask the retail client for information on his/her knowledge and experience to assess whether the investment service or product envisaged is appropriate for the retail client and to issue a warning in case the investment service or product is deemed inappropriate. If assets are deemed ineligible for UCITS, thus denying retail investors the possibility to invest in their chosen asset class via a UCITS, an investor may increase the risk profile of their personal portfolio as they would not receive the benefits of sophisticated investment selection and ongoing risk management provided by a professional investment manager. It is necessary to balance the need of investors for convenient access to an investment portfolio selection which is contemporary and relevant to their needs, as well as the ability of asset managers to tap into the most extensive possible investment universe, and the societal ambition to optimally facilitate the green transition.

The positive impact of an investment manager goes beyond qualification and expertise. For example, investment managers frequently add to the discussion on the asset classes that they invest in by publishing high quality research, insights, and other updates provided to investors on a regular basis that enable retail investors to increase their understanding of the risks and rewards available. If UCITS funds are not permitted to invest in an asset class that qualifies as an eligible asset for a UCITS because a regulator chooses to restrict such investment, then investment managers are unlikely to publish this information and retail investors will be more reliant on information made available by unregulated entities or individuals. This is particularly concerning when considering the low levels of financial literacy across Europe. In Ireland, around 57% of adults in Ireland meet the minimum Organisation for Economic Co-operation and Development (“**OECD**”) level of financial literacy[[5]](#footnote-6), with a minimum level of financial literacy meaning they can manage their money on a day-to-day basis with ease and can consider their long-term financial wellbeing. This leaves about 43% of adults in Ireland without the minimum financial literacy needed. In addition to this, 44% of the adult population do not have the minimum level of digital financial literacy needed to navigate their finances. UCITS that are accessible to the retail investor provide the investor with access to robust investment products supported by a responsible investment manager that can facilitate investment based upon preferences without the same risk of unregulated and inhibited direct investment.

The review of the asset eligibility framework must be comprehensive, focusing not solely on the provisions of the EAD but of the UCITS asset eligibility framework and its interlinkages with other legislative measures which emerged since 2007, as well as addressing market and technological advances, including the wide range of financial instruments which have emerged since then. There have been updates to ESMA liquidity stress testing guidelines[[6]](#footnote-7) and the UCITS review (under AIFMD II[[7]](#footnote-8)) which expands the liquidity management tools for UCITS. Maintaining the credibility and recognition of the UCITS brand must be central to this review and the impact on the UCITS Directive itself should be limited in order to maintain regulatory stability.

<ESMA\_QUESTION\_EADC\_1>

1. 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>

It is important to note that exposure to an Index can be a useful tool for hedging market exposure. Financial indices are widely used by both retail and professional investors, often because indices act as a means of gaining market exposure without having to trade each individual line directly. Additionally, indices can also be a more cost-effective way of accessing a certain exposure/strategy.

The EAD and ESMA Guidelines on Exchange Traded Funds (“**ETFs**”) and other UCITS issues[[8]](#footnote-9) in general provide sufficient clarity regarding the application of the principles on indices and to secure investor protection. However, there are some issues with the interpretation and consistent application of UCITS EAD rules to financial indices that if addressed, would improve supervisory convergence and clarity:

1. Additional clarity on the following:
   1. as to what constitutes an eligible financial index comprised of ineligible assets would be welcome. For example, ESMA has clarified that constituents of an index can be commodities, real estate, fund of hedge funds but further clarity on other ineligible asset classes that currently exist (e.g. crypto / digital assets, carbon allowances, etc.) would be helpful;
   2. the term ‘market’ as referenced in Article 9(1)(b) *(“they represent an adequate benchmark for the market to which they refer”*) in the context of a financial index incorporating a complex strategy;
   3. for commodities indices, the question of representativeness arises when there are equally rated or over-rated indices. Further clarity or guidance could also be provided around the parameters for being an “adequate” benchmark of a market if the index has been created and calculated on the request of one, or a very limited number of, market participants and according to the specifications of those market participants on the basis that information regarding the calculation methodology and performance etc. is freely available to investors and therefore such index is freely available for other investors to invest in.

The requirement by some Member States (e.g. Ireland pursuant to Central Bank of Ireland [“**CBI**”] Guidance on UCITS Financial Indices[[9]](#footnote-10)) that a submission be made to the competent authority at the time the UCITS seeks authorisation setting out why an increased weighting of 35% from 20% in a single issuer is justified by exceptional market conditions (noting Art 53(2) of the UCITS Directive is not prescriptive on the timing of such a submission).

<ESMA\_QUESTION\_EADC\_2>

1. 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>

Irish Funds members have not encountered recurring or significant issues with the interpretation or consistent application of UCITS EAD rules with respect to money market instruments.

<ESMA\_QUESTION\_EADC\_3>

1. 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>

Irish Funds members have not 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.

Since the adoption of the EAD in 2007, there has been a significant body of rules and guidance published that supplement the notions of liquidity or liquid financial assets (examples below). These are used to guide fund managers in designing their liquidity risk management policies:

1. the additional provisions on liquidity risk management introduced by Implementing Directive 2010/43/EU (Articles 40(3) and (4))[[10]](#footnote-11);
2. ESMA guidelines on liquidity stress testing[[11]](#footnote-12);
3. International Organization of Securities Commissions (“**IOSCO**”) Recommendations for Liquidity Risk Management for Collective Investment Schemes[[12]](#footnote-13); and
4. the recent amendments introduced by Directive (EU) 2024/927 to the UCITS Directive (as part of the AIFMD II/UCITS review)[[13]](#footnote-14), and Level 2 measures around liquidity risk management and tools.

As a result, Irish Funds does not observe a need to adapt or further specify these notions as they are clearly outlined in the above regulations / guidelines.

UCITS funds are highly regulated fund products and, as highlighted above, have been assessed most recently in the context of the political agreement on the AIFMD Reform. For example, UCITS managers and Alternative Investment Fund Managers (“**AIFMs**”) must comply with the ESMA guidelines on liquidity stress testing[[14]](#footnote-15) (“**LST**”). These guidelines require an appropriate LST policy is implemented to ensure the fund is sufficiently liquid and should be conducted at each stage of the fund’s lifecycle.

It is important to recognise that liquidity is not a static measure, instead liquidity is dynamic and may change depending on a multiple of factors. Therefore, Irish Fund’s view is that the fund management company (“**FMC**”) is best placed to determine and manage the liquidity for their own suite of funds. The FMC determines their funds’ investment strategies and are closest to their portfolio of assets and therefore understand the true liquidity of their portfolios and the relevant conditions (both market and others (e.g. geopolitical) that would impact their funds’ liquidity. The notion of liquidity should therefore be considered within the context of the overall portfolio and not just on the basis of individual security types.

We would also refer you to the Irish Funds response[[15]](#footnote-16) to the Financial Stability Board (“**FSB**”) Consultation Report on Addressing Vulnerabilities from Liquidity Mismatch in Open-Ended Funds from September 2023, which emphasizes several key points regarding liquidity management. Irish Funds cautioned against adopting single definitions, as the evaluation of liquidity in stressed markets can differ based on factors such as asset class, managerial approach, and economic conditions and would therefore oppose overly prescriptive bucketing of securities as liquid, less liquid, or illiquid.

<ESMA\_QUESTION\_EADC\_4>

1. 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 accordance with Article 2(1) of the EAD, the assumption is that, in the absence of any information that would lead to a different determination for the UCITS, the presumption of liquidity and negotiability can be reasonably applied to financial instruments which are admitted or dealt in on a regulated market. However, this assumption cannot be considered as an absolute rule by UCITS managers, since being listed on a regulated market does not automatically guarantee the liquidity of an instrument. The results of ESMA’s 2020 CSA on UCITS liquidity risk management[[16]](#footnote-17) identified some cases where UCITS managers placed an over-reliance on the presumption of liquidity where they invested in listed securities (e.g. instruments listed offshore with no meaningful trading volume) or applied the presumption of liquidity to non-listed instruments. Therefore, irrespective of whether a financial instrument is listed, an assessment of its liquidity is necessary as part of robust risk management practices.

Nonetheless, the presumption of liquidity remains a valid concept when supplemented by pre-investment and ongoing liquidity analysis, where deemed appropriate. The considerable advancements in liquidity risk management practices (as emphasized in question 4), has meant UCITS managers are better equipped to make informed decisions by assessing all available data in addition to the liquidity presumption, as mandated by the final section of Article 2(1) in the EAD.

The presumption of liquidity allows fund managers to operate under a pragmatic, risk-based approach, focusing their attention and resources more effectively on liquidity risk monitoring and management across a broad range of asset types. Removing this presumption could lead to increased operational costs for fund managers, as they would need to invest in additional data feeds to monitor the liquidity of a broader range of assets. These additional costs would likely be passed on to the end investor, making investment more expensive. Therefore, the current approach, which combines policy oversight with targeted checks on specific assets, is seen as preferable for both managing liquidity risks effectively and minimizing unnecessary costs for investors. In this regard, we would also strongly advocate for the accelerated development of a European Consolidated Tape to allow all market participants easy access to high quality trading data which would enhance European capital markets[[17]](#footnote-18), consequently reducing cost and improving market transparency for investors.

<ESMA\_QUESTION\_EADC\_5>

1. 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>

The UCITS Directive does not provide a definition of what constitutes ancillary liquid assets though typically these would be understood to fulfil two criteria:

1. they are “ancillary” to the main objective of the fund; and
2. they are considered to be liquid, i.e. things that can be quickly converted to cash at, or very close to their current value.

This could include cash deposits, money market instruments such as short-dated government treasury bills, money market funds and reverse repurchase agreements.

The UCITS Directive does not specify a precise threshold for holding ancillary liquid assets. According to Recital 41 of the UCITS Directive, the intention behind this omission was to allow for adaptability in managing payments, reinvesting proceeds from the sale of assets in the portfolio or pausing investments in other financial instruments under certain market conditions. Nonetheless, the cap on ancillary liquid assets is determined at the national level, leading to variations across different member states.

Examples of national divergences include:

* In Ireland, there is no limit on the level of assets that may be held for ancillary liquidity[[18]](#footnote-19) but a fund may not place more than 20% of its net assets in deposits with a single counterparty irrespective of whether accounts are held for investment or ancillary liquidity purposes;
* In Luxembourg, ancillary liquid assets are understood as including only bank deposits at sight, such as cash held in current accounts with a bank accessible at any time (therefore excluding Money Market Funds [“**MMFs**”] / Money Market Instruments [“**MMIs**”] and margin accounts). The holding of ancillary liquid assets is allowed for (i) covering current or exceptional payments, (ii) the time necessary to reinvest in eligible assets, or (iii) a period of time strictly necessary in case of unfavourable market conditions and is limited to 20% of the net assets of the UCITS, which can be exceeded temporarily only when, due to exceptionally unfavourable market conditions, circumstances so require and where such breach is justified having regard to the interests of the investors[[19]](#footnote-20);
* In France, the Autorité des Marchés Financiers (“**AMF**”) has set a separate ratio for ancillary liquid assets and for deposits. Ancillary liquid assets may be held up to 10% and can be raised to 20% in exceptional circumstances. In this case, the AMF requires a maximum of 30% total exposure to a single counterparty, by including this (unsegregated) cash held at sight;
* In Slovenia, the term ancillary liquid assets as outlined in the local legislation comprises cash, demand (sight) deposits and cash equivalents that have negligible risk of change in value. They are not limited to the base currency;
* In Denmark, ancillary liquid assets are interpreted as meaning cash deposited in a bank account which is immediately accessible. This definition does not encompass (i) collateral, whether posted or received, or (ii) excess margin posted to a clearing broker for pre-funding. Term-based deposits have not been assessed;
* In Austria, the situation is governed by a decision of the administrative high court as no provision on the treatment of ancillary liquid assets has been transposed into national law;
* In Sweden, a UCITS can hold ancillary liquid assets ‘to the extent necessary for the management of the fund’. The rule is sufficiently flexible when it comes to handling misalignments in the settlement cycle of the fund and its underlying assets. Swedish practice is that those assets should not extend to more than 10% of the fund’s assets on an ongoing basis, however the national rules still provide enough flexibility to occasionally go above that limit if necessary for the management of the fund;
* In Italy, ancillary liquidity is not subject to any limit, in contrast to investments in bank deposits.

We would support further clarification on the relevant limit to the holding of ancillary liquid assets at a European level, in order to avoid the national divergences being applied. Irish Funds strongly supports the position that there should be no limit on the level of assets held for ancillary liquid purposes subject to regulatory restrictions to any one institution/issuer (per the current Central Bank of Ireland position).

Finally, it is important to note that in May 2024, several countries, including the United States, Canada, and Mexico, transitioned to a shortened settlement cycle of T+1 for domestic securities transactions. As a result, operational challenges may arise where there is a mismatch between a fund’s dealing cycle and the standard settlement cycle for securities in a domestic market. Furthermore, there are scenarios where regulatory rules, such as those imposed by the UCITS Directive and/or NCAs, on deposit and ancillary liquidity limits, are contravened as a direct result.

On 21 March 2024, ESMA published a feedback statement[[20]](#footnote-21) to its Call for Evidence on shortening the settlement cycle. In the report, ESMA addressed the potential breach of UCITS limits for investments in deposits (Article 52(1)(b) of UCITS Directive) arising in the context of the US transition to T+1. ESMA emphasised that the UCITS Directive distinguishes between UCITS investing in deposits and UCITS holding ancillary liquid assets which is also reflected in Recitals 40 and 41 of the UCITS Directive. ESMA subsequently clarified that the second subparagraph of Article 50(2)(b) of the UCITS Directive sets out that UCITS may hold ancillary liquid assets, without providing for any explicit quantitative limit. In light of this, ESMA advised that it does not see any obstacles in the EU legislation for UCITS to deal with the expected change of the settlement cycles to T+1 in the US. The view expressed in the ESMA report and the examples of national divergences listed above emphasise the need for further clarification on the relevant limit to the holding of ancillary liquid assets at a European level.

<ESMA\_QUESTION\_EADC\_6>

1. 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>

It is recognized that UCITS already have the capability to invest in, and generate exposure to, foreign currencies, such as by holding deposits in foreign currency, the use of derivatives or by purchasing securities denominated in foreign currencies. This practice should continue to be permissible, either directly or through indirect means, as long as the risks related to such investments are properly disclosed and managed following the same guidelines applied to other types of assets. Additionally, the details of these foreign currency exposures should be clearly outlined in the fund's prospectus.

However, while Irish Funds is of the position that UCITS should be permitted to acquire or hold foreign currency for investment purposes, we do not believe that there is a benefit in requiring funds/managers to monitor exposure to cash outside of usual UCITS limits or to monitor a move from cash for ancillary purposes as opposed to using it for investment purposes. Irish Funds is of the position that the existing UCITS rules regarding deposits and the global exposure rules are sufficient for managing risk and that no additional controls/disclosures should be required.

<ESMA\_QUESTION\_EADC\_7>

1. 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>

In its 2012 Opinion on Article 50(2)(a) of the UCITS Directive[[21]](#footnote-22) (“**the Opinion**”) ESMA clarified that the 10% limit set out in the UCITS Directive is an allocation that a UCITS may only use for transferable securities and money market instruments other than those admitted to trading on a regulated market. As such a UCITS must be comfortable that any security within this limit still constitutes an eligible asset in its own right. This can lead to some grey areas in relation to un-listed or delisted securities in terms of assessing ongoing eligibility in terms of transferability and negotiability bearing in mind that these securities tend to have negligible impact on the overarching ability of the UCITS to continue to be able to meet its investors redemption requests.

We believe there is merit in updating the Opinion in order to allow other[[22]](#footnote-23) types of Collective investment undertakings (“**CIU**”) to be eligible in the 10% ratio (where they meet the criteria for constituting a transferable security or money market instrument). This would permit limited exposure of UCITS to certain CIUs which do not fulfil the eligibility criteria in Article 50(1)(e), such as certain EU AIFs and ELTIFs, and certain non-EU ETFs listed on regulated markets in EU jurisdictions or countries such as the US, Switzerland and several jurisdictions in Asia (e.g. Singapore, Hong Kong, Japan).

Such CIUs can provide exposure to underlying eligible and ineligible asset classes, with the benefit that indirect exposure to ineligible assets would be subject to the management of the manager of the target fund, as well as diversification and transparency requirements applicable to the target fund. While not all CIUs falling outside the scope of Article 50(1)(e) should be automatically included within Article 50(2)(a), the evolution of the wider regulatory framework since 2007 for non-UCITS funds such as EU and non-EU AIFs managed by EU authorised AIFMs and European long-term investment funds (ELTIFs) which did not exist at that time, and for risk management processes (including liquidity risk management) to be employed by EU authorized AIFM managers, should be reflected to an extent within the EAD framework.

<ESMA\_QUESTION\_EADC\_8>

1. 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>

Irish Funds believes that any asset that meets the criteria for ‘transferable security’ outlined in the UCITS EAD should be permitted as transferable securities.

While the ‘transferable security’ criteria set out in the UCITS EAD is adequate and clear, the divergent views regarding the eligibility of certain asset classes have resulted to a certain extent because of the broad interpretation by NCAs of some of those criteria. For example, pursuant to the UCITS EAD:

1. the liquidity of a financial instrument must “*not compromise the ability of the UCITS*” to meet redemption requests. This does not prohibit a UCITS from purchasing an insufficiently liquid security provided there are other sufficiently liquid securities in the UCITS portfolio to meet redemptions on an ongoing basis. Notwithstanding this, and the fact that FMCs are subject to extensive liquidity risk management regulatory obligations as detailed in response to Questions 4 and 5 at both a pre-investment and ongoing basis, the level of liquidity of a financial instrument has become embedded by NCAs in the determination of whether a financial instrument constitutes a transferable security or money market instrument. While investment in transferable securities may be limited as a result of a UCITS management company employing its liquidity risk management process, Irish Funds suggests that process should not form part of the transferable security eligibility criteria.
2. the risks of a financial instrument must be “*adequately captured by the risk management process of the UCITS*”. Notwithstanding the requirement is to ensure that risks are captured by the risk management process of the UCITS, in practice NCAs take a broader view of this requirement in the context of determining eligibility by questioning the manager's ability to appropriately manage the risks. While investment in transferable securities may be limited as a result of a UCITS management company employing its risk management process, it is submitted that process should not form part of the transferable security eligibility criteria.

Irish Funds suggests that the criteria of what constitutes a transferable security should be amended to either:

1. exclude matters which are part of the UCITS management company's risk management process (such as liquidity risk management and management of other risks) and in particular the criteria referenced in (i) and (ii) above: or,
2. provide greater clarity in order to avoid ambiguity caused by the broader interpretation by NCAs of the specific criteria relating to liquidity and risk management to ensure that a literal interpretation (as detailed above) is applied only. This would ensure a uniform view by NCAs, UCITS managers and other stakeholders as to whether a financial instrument constitutes a transferable security or not. As to the level of investment (if any) in such financial instruments by a UCITS, that would be a matter to be assessed (separate to the question of eligibility) by each UCITS manager by employing its risk management framework to monitor and measure the risks (including liquidity) of such instruments and their contribution to the overall risk profile of the portfolio of assets of the UCITS.

In addition, Irish Funds suggests the requirement that the acquisition of a financial instrument be consistent with the investment objectives and policy, or both, of the UCITS in order for that financial instrument to constitute a transferable security should be deleted. While investment in financial instruments consistent with the investment objective and/or investment policy of a UCITS is an important investment / compliance function of the UCITS manager, Irish Funds suggests that process should not form part of the transferable security eligibility criteria.

<ESMA\_QUESTION\_EADC\_9>

1. 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>

As stated above in response to Question 9, Irish Funds believes the requirement that the risks of a financial instrument be “*adequately captured by the risk management process of the UCITS*” has been broadly interpreted by NCAs and accordingly suggests that the requirement be deleted or alternatively recalibrated to reflect its literal meaning.

Separate to the question of the eligibility of a financial instrument, each FMC is required to have an established risk management framework to incorporate and identify all risks (including liquidity playbooks, scenario analysis and liquidity stress testing). This overarching framework includes the FMCs risk management processes, procedures, and resources allocated across their product suite. It is important to note that as part of the risk management function, the FMC is obliged to identify relevant risks at the design stage of each fund. Essentially, this means that FMCs must ensure comprehensive coverage of all significant risks tied to investments (or when considering new asset classes) through their risk and investment compliance frameworks, including global exposure assessments and the IT infrastructure's ability to process and analyse risk data.

In relation to having “reliable” valuation/prices our members would like to highlight the existence of thorough procedures for valuing portfolio instruments, emphasizing the availability of observable prices (such as exchange quotes or prices from multiple counterparties) or, in cases where asset characteristics or specific situations (like assets under sanctions) necessitate, the implementation of a clear pricing policy, that may also be supplemented by a pricing committee. A focus on pricing sources is also key, including both a price verification process and periodic evaluation of pricing vendors. FMCs are expected to have “documented, comprehensive and entity specific asset valuation policies and procedures which clearly outline the operational roles and responsibilities for all parties involved in the asset valuation process[[23]](#footnote-24)”. These policies are required to be reviewed at least annually by senior management (or more frequently if required). FMCs are also expected to have procedures in place to ensure efficient remedial action is taken when a valuation error does occur.

Therefore, Irish Funds finds no recurring or significant issues with the interpretation or consistent application of the valuation related criteria set out in the UCITS EAD.

<ESMA\_QUESTION\_EADC\_10>

1. 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>

Overall, Irish Funds supports the inclusion of financial instruments backed by or linked to the performance of UCITS eligible or ineligible assets provided they constitute transferable securities and in the case of financial instruments backed by or linked to the performance of UCITS ineligible assets they do not include any embedded derivative.

Irish Funds finds 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 to be adequate and clear.

However, there are issues with consistency across member states regarding such instruments, in particular, those that are listed and traded on a regulated market and give exposure to underlying ineligible assets, for example:

1. For exchange-traded commodities (“**ETCs**”) giving exposure to a commodity such as for example gold, some EU member states will allow 100% exposure to gold through ETCs (subject to the UCITS complying with the 5/10/40 issuer rule at the fund level and the underlying risks being captured in the risk management process of the UCITS[[24]](#footnote-25)) while other jurisdictions will look through and require diversification at the underlying asset level (see footnote 15). A similar approach is applied in relation to exchange-traded note (“**ETNs**”) giving exposure to other ineligible assets such as carbon allowances;
2. For ETNs giving exposure to crypto assets such as Bitcoin, some member states will not permit UCITS exposure while others will allow limited exposure (e.g. 10% of NAV);
3. There are diverging views on diversification requirements for delta-one instruments. It seems in Germany, a fund could have a very high exposure to gold as long as the issuer diversification rule is adhered to (Germany’s Federal Financial Supervisory Authority [“**BAFIN**”] does not require look through for delta-one Instruments [see footnote 14]). The financial regulatory authority in Luxembourg, Commission de Surveillance du Secteur Financie (“**CSSF**”), position on look-through of delta-one instruments[[25]](#footnote-26) requires that a UCITS does not invest exclusively in different securities which are all linked to the performance of the same underlying asset. See question 13 response for more on the Irish Funds positioning on delta-one instruments;
4. UCITS’ investment in certain financial instruments that qualify as transferable securities (such as asset backed / mortgage backed securities, collateralised obligations, etc) are being limited by NCAs on the basis that inter alia (a) they give retail investors indirect exposure via the UCITS to risks that are the subject of specific regulatory measures at national level (aligned with the approach taken by the European Supervisory Authorities  [“**ESAs**”] in the context of the Markets in Financial Instruments Directive II [“**MiFID II**”] regime), or (b) there are concerns regarding whether retail investors can assess and understand the risks involved (notwithstanding investment through a professionally managed UCITS scheme). See question 9 response for more on the Irish Funds positioning on the treatment of transferable securities instruments.

In summary, there is no harmonised approach across Member States regarding the rationale for the limitation on investment in financial instruments backed by or linked to the performance of UCITS ineligible assets.

It is important to note that variations exist between Member States regarding the requirement for a manager to conduct a look-through to the underlying assets when a UCITS invests in a financial instrument that is backed by or linked to the performance of assets that UCITS cannot directly invest in. These differing views result in different scenarios across Member States where a UCITS can gain limited or unlimited indirect exposure to underlying assets that are not directly investable by them. Please see our response to Question 22 for more details on the Irish Funds position on the application of the “look through” approach.

<ESMA\_QUESTION\_EADC\_11>

1. 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>

Irish Funds believes that the concept of “embedded derivative” set out in the UCITS EAD is adequate.

Irish Funds members apply a one-to-one exposure test (known as a delta-one test) in determining whether a transferable security embeds a derivative. It is submitted that this is consistent with the regulatory requirement set out in Art 10 of the EAD that there should be no component in the financial instrument that (a) modifies the cash flows of the financial instrument similar to a stand-alone derivative; (b) has economic characteristics and risks not closely related to the financial instrument and (c) has a significant impact on the risk profile and pricing of the financial instrument.

<ESMA\_QUESTION\_EADC\_12>

1. 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>

Delta-one instruments offer a range of benefits that enhance the investment landscape, particularly for UCITS funds and their investors. These financial instruments allow for indirect exposure to assets that might not be directly accessible to UCITS funds, thereby broadening the investment universe and opportunities available to investors. This feature is particularly advantageous in jurisdictions where delta-one instruments are permitted on the basis that they do not incorporate a derivative component, thus facilitating a more straightforward investment process.

One of the key advantages of utilizing delta-one instruments is the diversification they offer to investment portfolios. By providing access to a wider range of assets, these instruments can help protect investors during market volatility, offering uncorrelated returns when traditional asset classes exhibit similar market movements. This diversification is crucial for risk management and for achieving a more stable investment performance over time. Moreover, delta-one instruments come with the added benefit of institutional-grade product due diligence. This encompasses a thorough assessment of legal, operational, and service provider arrangements, as well as a detailed evaluation of the underlying assets, including custody arrangements. Such rigorous due diligence ensures that investments are made with a comprehensive understanding of all associated risks and operational intricacies, thereby enhancing the security and reliability of investments made through delta-one instruments.

In certain circumstances, it may be more cost efficient to obtain exposure to certain assets through delta-one instruments rather than direct investment or via indirect investment through other access vehicles such as mutual funds or derivatives.

Additionally, delta-one instruments contribute to the liquidity and efficiency of Exchange-Traded Products (“**ETPs**”) investments. By facilitating easier access to a variety of assets, these instruments can improve the market's overall liquidity, making it simpler for investors to enter and exit positions. This increased market efficiency is beneficial not only to individual investors but also to the broader financial ecosystem.

In the context of delta-one instruments other than exchange traded products such as ETCs and ETNs (for example structured notes, structured financial instruments etc. which may or may not be listed), it is generally understood that:

* a UCITS may hold such instruments notwithstanding the fact that they may be less liquid on the basis that there are other more liquid securities in the UCITS portfolio to cover redemptions; and
* the UCITS management company will need to limit investment in such instruments in order to manage the liquidity and other risks within the UCITS portfolio.

However, notwithstanding the above, NCAs in some of the EU Member States have certain practices that impose certain limits on investment in such instruments. This is despite the fact the risk management framework of the UCITS management company and evidence of its ability to monitor and measure the risks of such investments and their contribution to the overall risk profile of the portfolio of assets of the UCITS. We would submit that these practices and lack of transparency result in divergence of approach and interpretation within and between Member States and considerable delays in the authorisation / approval of UCITS.

In order to address diverging interpretations on the treatment of delta-one instruments under the EAD, Irish Funds would suggest that all delta-one instruments are assessed as to whether they constitute transferable securities in the same way as any other financial instrument as proposed by Irish Funds in response to Question 9. Based on this proposal, the extent of investment in such instruments would be a matter to be assessed (separate to the question of eligibility) by each UCITS manager by employing its risk management framework to monitor and measure the risks (including liquidity) of such instruments and their contribution to the overall risk profile of the portfolio of assets of the UCITS.

<ESMA\_QUESTION\_EADC\_13>

1. 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>

The differentiation in the EAD between 'open-ended' and 'closed-ended funds' is outdated and requires revision to reflect the developments brought by Directive 2011/61/EU as amended (the AIFMD[[26]](#footnote-27)) and Regulation (EU) 2015/760 as amended (the ELTIF Regulation[[27]](#footnote-28)). Currently, the EAD's reference to 'closed-ended funds' restricts only these types of funds to be counted within the 10% limit outlined in Article 50(2)(a), excluding other funds based on their open-ended structure. However, since the EAD's introduction in 2007, there has been significant regulatory progress for open-ended and closed ended AIFs at the manager level and for ELTIFs at the product level, making this distinction increasingly irrelevant. It's noteworthy that the EAD allows UCITS to invest in closed ended funds which might offer less liquidity than open-ended funds, under certain conditions.

Therefore, it is suggested that the term 'closed-ended funds' in Article 2(2) of the EAD should be replaced to include AIFs, regardless of being open or closed-ended, as well as similar funds from non-EU jurisdictions, provided they adhere to equivalent standards regarding manager supervision and valuation accessibility.

<ESMA\_QUESTION\_EADC\_14>

1. 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>

Irish Funds members have not observed recurring issues with the interpretation or consistent application of the rules on UCITS investments in (1) EU Exchange Traded Fund (“**ETFs**”). However, Irish Funds members have observed recurring issues with (2) non-EU ETFs.

Similar to non-EU AIFs, non-EU ETFs must comply with the requirements set out in Article 50(1)(e) of the UCITS Directive in order to qualify as an eligible collective investment undertaking investment.

These specific UCITS requirements include similar rules on investment policies, asset segregation, indebtedness, leverage, and short selling. In addition, many non-UCITS ETFs may not meet the 10% rule under Article 50(1)(e)(iv) of the UCITS Directive which requires that the 10% limit be reflected in the fund rules or instruments of incorporation of the non-UCITS ETF or alternatively they may satisfy the requirement, but money market funds are excluded as is the case for US ETFs. As a result, many non-UCITS ETFs do not qualify under Article 50(1)(e) of the UCITS Directive.

Additionally, specific national regulations within the EU derived from the implementation of Article 50(1)(e) criteria introduce more barriers for UCITS to invest in non-EU AIFs.

According to the 2012 Opinion by ESMA[[28]](#footnote-29), non-EU ETFs are also excluded from the scope of Article 50(2)(a) of the UCITS Directive which only includes closed-ended funds, despite these ETFs exhibiting characteristics, such as liquidity and daily valuation, akin to securities on secondary markets. This situation is disadvantageous for UCITS seeking cost-effective means to access markets through ETFs instead of direct investments. Moreover, it leads to inconsistencies where a non-EU ETF containing assets directly investible by UCITS is ineligible, whereas a closed-ended fund would be eligible regardless of its underlying assets.

Where a non-EU ETF does not meet the requirements set out in Article 50(1)(e) of the UCITS Directive, it would be logical to allow UCITS to invest in non-EU ETFs under Article 50(2) of the UCITS Directive as long as these ETFs are traded on regulated markets within the EU or in jurisdictions with comparable regulatory safeguards, and meet the criteria of a transferable security despite not currently qualifying due to their classification as Collective Investment Schemes rather than transferable securities. Addressing this issue could involve harmonizing the implementation of these requirements across EU Member States or modifying the UCITS regime to allow investments in non-EU ETFs as transferable securities, in particular EAD and ESMA’s 2012 Opinion on Article 50(2)(a) of the UCITS Directive.

<ESMA\_QUESTION\_EADC\_15>

1. 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>

Guidance on EU Directives should originate exclusively from ESMA to avoid the issuance of conflicting advice by different regulators, which can lead to inconsistency and the potential for regulatory arbitrage. The practice of disclosing securities lending fees in Key Investor Information Documents / Key Investor Documents, pre-contractual documents, and financial statements, accompanied by standardized disclaimer language, promotes fee transparency. We advocate for investor disclosures that enable informed decision-making as the optimal strategy.

The ESMA Guidelines on ETFs and other UCITS Issues[[29]](#footnote-30), which address disclosures, risk management, contractual terms, and more, are already being implemented by competent authorities and UCITS management companies. Employing efficient portfolio management (“**EPM**”) techniques is advantageous for both end-investors, by generating additional revenue to enhance investment performance, and for the broader market, by contributing additional liquidity.

The UCITS Eligible Assets Directive should clearly permit a fee division related to EPM activities. UCITS managers should have the authority to charge a fair market rate fee (inclusive of a margin) for organizing, preparing, and conducting securities lending transactions from the total revenues produced by these activities, regardless of whether the activity is outsourced or conducted internally. It should also be stipulated that all direct and indirect expenses are covered by the UCITS manager from their share of the fee division. This fee division approach offers investors the clearest understanding of the fees the UCITS will receive.

The issues identified with the ESMA reports relate to variations inEPM costs charged to UCITS, notably where EPM techniques were carried out by the management company or a related party, referring to a Better Finance research paper[[30]](#footnote-31). The costs expended for engaging in EPM techniques must be viewed in the context of the quality of protection afforded to investors against risks inherent in EPM techniques. The level of cost will be commensurate with, for example, the experience of the securities lending agent, the level of indemnity provided for counterparty default, the percentage of the portfolio on loan; examples of factors impacting variations in costs are as follows:

1. The degree of collateralisation;
2. The experience of the securities lending agent (internal or external), and whether they provide indemnification for counterparty default;
3. The added-value provided by the lending agent and its capacity to capture market interests;
4. Additional counterparty risk assessment (i.e., a second due diligence on borrowers proposed by the securities lending agent);
5. Maintenance of websites and annual reporting disclosures on collateral and lending income and counterparties.

When the additional earnings from employing EPM techniques are the only source from which expenses are subtracted, and not the fund's principal assets, pushing for higher extra profits at the cost of safeguarding investor interests would not be beneficial for investors. Since the division of fees is based on total earnings before expenses, there's no chance for any concealed profits to be subtracted. Moreover, this approach allows investors to easily assess UCITS that utilize this method of fee division.

Previous suggestions, such as those during discussions in the recent AIFMD/UCITS review in Parliament, aimed at capping the operational costs associated with EPM to a specific portion of the generated income, have raised concerns. Imposing a cap on deductible costs for EPM activities could either limit the protective measures a fund manager can afford, affecting risk management strategies, or might lead fund managers to stop using EPM techniques.

This could lead to reduced competition among EPM service providers, potentially resulting in investors receiving less favourable terms due to the decreased competition. Moreover, restricting access to a key avenue for enhanced performance would not only disadvantage investors but also adversely affect financial markets by reducing liquidity, as securities lending activities might decrease. However, ensuring that the use of EPM techniques aligns with investor interests could be achieved through transparency regarding the characteristics, earnings, and expenses of the EPM techniques used, in line with existing ESMA guidelines.

<ESMA\_QUESTION\_EADC\_16>

1. 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>

Irish Funds believes it is not beneficial to replace the concept of EPM techniques within the UCITS framework with the notion of Securities Financing Transactions (“**SFTs**”) as outlined in the Securities Financing Transaction Regulation (“**SFTR**”). Such a change would narrow the scope of EPM techniques to only include securities lending, repurchase agreements, and reverse repurchase agreements, excluding other techniques that are or may be used for efficient and cost-effective portfolio management. While SFTs are typically used as EPM techniques, UCITS may also use other techniques as outlined in their prospectuses. Consequently, Irish Funds suggests maintaining the current flexibility offered by the EPM techniques definition. These are distinct from EPM instruments, which are generally derivatives used for EPM purposes. To improve consistency across NCAs, we propose that ESMA could create a non-exhaustive list of techniques considered EPM techniques. This approach would preserve the current flexibility of the EPM techniques definition while enhancing consistency across NCAs.

<ESMA\_QUESTION\_EADC\_17>

1. 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>

The landscape of financial markets has undergone significant transformations since the implementation of the EAD. Notably, the introduction of MiFID II (and Markets in Crypto-Assets Regulation [“**MiCA**”]) has brought about precise definitions and requirements for concepts, including the assessment of the target market. To improve the clarity and relevance of the EAD, it is recommended that references to obsolete legislation within the EAD, specifically the superseded Directive 85/611/EC, be updated to reflect the current UCITS Directive.

Irish Funds suggests that changes to the MiFID II regime may be a more practicable solution to address NCA's concerns regarding retail investors (as opposed to imposing investment limits within the UCITS fund which should be a matter for the UCITS manager to determine based on its risk management framework and its regulatory obligations relating to the management of risks). Under the current MiFID II regime only structured UCITS are considered complex financial instruments and as a consequence, MiFID investment firms executing orders or receiving and transmitting orders (at the request of retail investors) must carry out an appropriateness test before providing any such service relating to the structured UCITS. In this regard, Art 25(3) of the MiFID Directive provides that MiFID investment firms must ask their client or potential client to provide information regarding that person's knowledge and experience in the investment field relevant to the specific type of product or service offered or demanded so as to enable the MiFID investment firm to assess whether the investment service or product envisaged is appropriate for the client.

In relation to the term 'regulated markets', the Q&A on the UCITS Directive provided by ESMA[[31]](#footnote-32) acknowledges that Multilateral Trading Facilities (“**MTF**”) operating within the European Union can be classified under this category, a clarification that is positively received. However, concerning trading venues located outside of the European Union, it is advised that the stipulation requiring an equivalence decision, as outlined in Article 25(4) of MiFID II, should not be directly applied to the definition of 'regulated markets' within the context of the UCITS EAD. The imposition of such a requirement would unnecessarily restrict the range of assets deemed eligible, given that equivalence decisions have only been made for select markets in Australia, Hong Kong, and the United States. It is important to note that the objectives underlying these equivalence decisions differ fundamentally from the intentions of the UCITS regulatory framework.

The EAD instituted several stipulations for the utilization of financial indices by UCITS, many of which have been overtaken by the advent of specific regulations that are directly enforceable under Regulation (EU) 2016/1011 as amended (the “**Benchmarks Regulation”)** and the ESMA Guidelines on ETFs and other UCITS Issues[[32]](#footnote-33). Consequently, in instances where the administrator of an index is authorized or registered in compliance with the Benchmarks Regulation, the necessity for overlapping requirements related to governance and transparency, as specified in Article 9(b) and (c) of the EAD, should be obviated. Nonetheless, it is acknowledged that the ongoing revision of the Benchmarks Regulation might exclude a significant number of benchmarks and their administrators from its purview, potentially influencing the harmonization efforts between the EAD and the Benchmarks Regulation. Furthermore, regarding the characterization of an index within the Benchmarks Regulation, it is observed that not all indices might be encompassed by the Benchmarks Regulation, thus suggesting that an alignment of the index definition is presently inadvisable.

<ESMA\_QUESTION\_EADC\_18>

1. 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>

As detailed in response to Question 1, certain NCAs have introduced an enhanced scrutiny process whereby certain financial instruments are scrutinised resulting in investment in such instruments being either prohibited or limited. However, there is no harmonised or transparent approach across Member States regarding the process itself, the timeframe involved and rationale for any prohibition / limitation on investment in the relevant financial instrument (in particular where global asset manager(s) with expertise in the relevant financial instrument have provided data regarding liquidity, valuation information, safe keeping, etc.). This results in uncertainty regarding what investment strategies can be used in UCITS products for the benefit of investors and an unlevel playing field for UCITS domiciled in different Member States.

In addition to enhanced scrutiny, a number of divergencies between Member States have been identified. As outlined in responses to other questions, convergence in the interpretation of existing rules across the EU enhances the UCITS framework by providing legal certainty, transparency and comparability for investors and removes obstacles for cross-border distribution:

* **Other funds:** Danish law requires a UCITS to only allocate investments to other funds that adhere strictly to the risk-spreading principles of UCITS, which appears more stringent than required by EU law.
* **Financial indices:** national competent authorities have diverging interpretations with respect to the eligibility criteria and approval process for financial indices. For instance, the eligibility criteria in Luxembourg appear more detailed than those stipulated in the UCITS directive, and in Denmark, the Danish Financial Supervisory Authority (“**DFSA**”), which is responsible for approving financial indices, has adopted a more conservative stance in their approval of new indices.
* **Ancillary Liquid Assets:** we have outlined above in response to Question 6 instances of national divergences imposing different limitations on ancillary liquid assets.
* The requirement in Luxembourg for certain assets, strategies, and instruments to be disclosed in the prospectus in order to be permitted, as per the template for new funds (Questionnaire for the approval of a new sub-fund – CSSF), is an interpretation which we have noted being adopted in other Member States.
* **Derivatives:** in Denmark, specific local requirements exist on the use of derivatives by UCITS. In Italy, specific rules exist on the method of calculation of the amount to cover the cash commitment arising from short positions in derivative financial instruments, and the VaR model can only be used for the calculation of the global exposure where it is specifically authorized by the NCA.
* **Securities lending:** in Sweden, national rules limit the percentage of the fund’s assets which can be used for securities lending to a maximum of 20%. This creates an unlevel-playing-field for UCITS registered in Sweden, particularly index funds.
* **Global Exposure:** when calculating global exposure using the commitment approach, the Swedish Financial Supervisory Authority provides that financial derivatives can be netted only against “cash which is invested in risk free assets” but not against a “cash position”. This is based on an interpretation of the Committee of European Securities Regulators (“**CESR**”) Guidelines on Risk Measurement and the Calculation of Global Exposure and Counterparty Risk for UCITS[[33]](#footnote-34), which provides that Financial Derivative Instruments (“**FDI**”) should not 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 Swedish position means that cash would have to be invested in certain assets to be considered “risk free” and thus eligible for netting. This has forced some management companies to use the VaR-calculation approach instead of the commitment approach which may otherwise be more suitable for the fund. For legal certainty reasons and for a level playing field it should be clarified that “cash” is considered a risk-free asset and eligible for netting.
* **Loans:** there is divergence as to whether loans can be considered eligible assets for UCITS. In Ireland, unsecuritised loans can be eligible if they satisfy the definition of a money market instrument under the UCITS Directive. Typically, these unsecuritised loans are floating rate commercial loans in the form of loan participations or assignments and a UCITS can invest up to 10% in such unsecuritised loans. In Luxembourg, since August 2020, loans were stated not to be considered eligible assets. In other jurisdictions, they are partially permitted. In Ireland, investment in securitised loans such as CLOs are permitted subject to enhanced scrutiny at the authorisation phase.
* **Certificates representing commodities:** in Austria and Germany, UCITS are not permitted to acquire certificates representing commodities which lead to a physical delivery, either by way of agreement with the issuer or by de facto not exercising the right of delivery.
* **Short-term borrowing:** Article 83(2)(d) of UCITS permits UCITS to borrow up to 10% of their NAV for a short-term period. In Austria, the regulator restricts this to be permitted only for exceptional redemptions.
* **Investments in other CIUs:** in France, the term ‘asset segregation’ in Article 50(1)(e)(ii) was implemented with an incorrect translation, which led the AMF to interpret that criterion as equivalent to the risk spreading rule in Article 52 of UCITS. This creates an issue for French UCITS, as most AIFs are not eligible for the 30% ratio.
* **Look through approach:** BaFIN states explicitly that look through is not required so that there could be a fund holding 100% in Gold backed ETCs as long as the diversification requirement on issuer level is adhered to. The CSSF requires look through on Delta-one Instruments and diversification at the underlying asset level.
* **Crypto Assets:** Germany allows up to 10% exposure in ETPs backed by Crypto Currencies. Spain seems to take a similar approach. The CSSF seems to allow Crypto ETPs into UCITS which are only marketed to well informed investors.

<ESMA\_QUESTION\_EADC\_19>

1. 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>

Please see the separate annex containing our response to question 20.

<ESMA\_QUESTION\_EADC\_20>

1. 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>

Investing through indirect means can lead to cost savings for investors, such as benefiting from economies of scale and avoiding the operational complexities tied to direct investments in certain types of assets. However, indirect investment might also result in higher expenses due to fees for structuring, licensing for indexes, and the cost of acquiring market data. These costs need to be balanced against the advantages of gaining exposure to the underlying assets through these methods.

The choice of instruments for achieving indirect exposure varies, and it falls upon the management company to decide whether direct or indirect investment serves the UCITS shareholders' best interests. This decision-making freedom is crucial as it enables the manager to opt for the most beneficial approach for investors. Gaining indirect exposure via delta-one instruments, other ETPs, and Over-The-Counter derivatives can significantly benefit investors. Nonetheless, it is essential for investors to be aware of the specific costs associated with these instruments, such as margins paid to providers or adjustments in returns, for instance, due to withholding taxes not applicable to direct investments.

Guidance on disclosing these embedded costs is important, especially considering the adjustments in returns for estimated funding, transaction costs, or when using a “net total return” index adjusted for withholding taxes compared to a “gross total return” index. Indirect exposure can be achieved through various channels:

1. Via open or closed AIFs, offering exposure through a well-regulated fund, enabling portfolio diversification and de-correlation with limited leverage;
2. Through derivatives, allowing exposure to otherwise non-directly investable assets (like gold or oil futures), enhancing portfolio diversification and de-correlation, provided netting and diversification limits are observed;
3. Via indices enabling indirect investments into specific markets, commodities, and various financial instruments within diversification limits; and,
4. Through Exchange-Traded Products (ETPs) such as ETCs and ETNs, offering diversification and at lower replication costs.

The primary benefits of these investment methods include operational simplicity and regulatory assurance, which in turn reduce costs and risks for UCITS investors.

It is important to note that UCITS asset managers might lack the expertise or resources for direct investments, such as establishing custody for assets like carbon allowances, crypto assets, or precious metals, or accessing liquidity venues for these assets. Regardless, UCITS asset managers are required to conduct thorough due diligence on the indirect investment vehicles they choose and ensure the product setup is adequate, for example, regarding custody arrangements. ETCs in particular, are a regulated, transparent form of security, typically held within a regulated Central Securities Depository and traded on regulated exchanges, offering greater liquidity than the physical market. However, some of these instruments may decrease transparency and elevate costs, underscoring the need for clear investor disclosures and transparency.

<ESMA\_QUESTION\_EADC\_21>

1. 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>

Irish Funds is of the position that the look through approach is not appropriate to determine the eligibility of assets except for in the case of derivatives. It is submitted that a look through approach should not be required to determine the eligibility of financial instruments where no derivative is in place / embedded.

Indeed, where there is a derivative / embedded derivative, look through should be required to ensure any underlying exposure to an eligible asset or (via a financial index) ineligible asset is holistically assessed in the context of risk management, liquidity, diversification and/or leverage rather than strict asset type.

The exclusion of certain asset classes in the original UCITS Directive was driven by investor protection both regarding the exposure to certain asset classes as well as the ability of the UCITS to manage such asset classes. For example, it is understandable that UCITS should not directly grant loans as they are difficult to transfer, and servicing loans might be a difficult task for normal UCITS management companies or that UCITS should not directly invest in commodities due to the operational and other risks referenced earlier. The counterpoint is where such an instrument is structured in a manner that removes the operational burden, such as Corporate Bonds (providing a similar economic profile as corporate loans) or certain delta-one instruments, then as long as the instrument itself meets all the requirements of the EAD and the UCITS is able to manage the corresponding risks appropriately, the UCITS should be allowed to invest in such instruments.

Finally, it is important to note that we observe that the varying interpretations among Member States regarding the necessity of a look-through approach have adverse effects on both investors and the industry. These differences lead to competitive imbalances, regulatory arbitrage and legal ambiguities for the industry. Notable examples of these national discrepancies include Germany's official stance, along with several other countries, where a look-through is not mandated for assessing the eligibility of delta-one instruments, aside from broader risk management requirements. In Luxembourg, instruments that do not incorporate a derivative are exempt from the look-through requirement, although the principle of risk diversification mandates a look-through for risk management. Spain exempts delta-one instruments that are frequently traded and priced based on third-party transactions from the look-through requirement. Meanwhile, in France, ETCs are subjected to a look-through approach.

Thus, Irish Funds advocates for ESMA to clarify that the look through approach *should not be required to determine the eligibility of assets*, except for in the case of derivatives but believes no security should be used to bypass UCITS*.* However, the rules should provide for clear and consistent application across all Member States.

<ESMA\_QUESTION\_EADC\_22>

1. 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>

The potential for UCITS to invest in securitizations could unlock several advantages that are presently restricted by burdensome administrative conditions. UCITS could tap into returns that are generally higher than those offered by other fixed-income assets, access a diversified source of liquidity that can be valuable during periods of market turbulence, and engage in a market that supports the growth of the real economy across all European member states.

Performing thorough due diligence is a crucial aspect of evaluating the risks associated with these securities and is a fundamental responsibility (i.e., fiduciary duty) of managers to investors. Nonetheless, there is potential to streamline this procedure for both the issuers and investors involved, as the current system presents considerable obstacles for both parties. This streamlining could include unifying various reporting formats into one comprehensive template and potentially reducing the amount of detail demanded in these reports, especially for private securitizations or those with a very high investment grade.

We acknowledge that this matter is complex and multifaceted, requiring a comprehensive approach for consideration. We also note these components will be more thoroughly assessed during the EU Commission's forthcoming consultation on the securitisation market.

<ESMA\_QUESTION\_EADC\_23>

1. 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>

Short positions are an essential tool at the disposal of investment managers that can be utilised for investment and/or hedging purposes. Short positions are used for a variety of reasons, and across a broad array of fund strategies. Their inclusion in UCITS allow a greater choice of investment options for investors.

In terms of risks, short positions can lead to a ‘short squeeze’ phenomenon where the price of a security increases significantly leading to margin calls against the fund. Large margin calls can result in challenges within portfolios where an urgent requirement for cash is required. However, ESMA’s LST guidelines[[34]](#footnote-35) specifically requires FMCs to incorporate such potential liabilities in the stress testing programme.

Additionally, excessive short positions can lead to increased levels of leverage being taken which can result, where not managed appropriately, in large performance downturns. UCITS must disclose the level of leverage to investors ensuring the investors are fully aware of these risks. UCITS must also have a Risk Management Policy (“**RMP**”) in place for funds that use derivatives which outline the controls in place when trading in derivatives.

In terms of benefits the use of synthetic short positions allows for an effective execution of a fund’s investment objective. There is a wide variety of investment strategies that include short positions and as mentioned above there is clear benefit of choice to investors.

When used for hedging purposes, short positions allow UCITS to provide capital protection to investors in times of wide market downturns or from idiosyncratic events depending on the type of short exposure taken. Short exposure is well established and understood by most investors. There are many UCITS which provide inverse exposure to certain markets and indices.

Short positions can also be essential for managing exposures and hedging risk within the fund’s strategy. Differing examples include reducing the delta to a certain market, hedging currency exposure through FX and Future positions, reducing credit risk through the use of index linked CDSs or hedging interest rate risk through bond futures. Therefore, short positions can play a key role in reducing the risk on a portfolio by hedging certain exposures for the benefit of the end investor. From a risk perspective, where it is intended to take out short positions this should be clearly disclosed within the fund's documents. It is also worth noting that UCITS are subject to global exposure limits which is a measure designed to limit either the incremental exposure and leverage generated by a UCITS through the use of derivatives (including embedded derivatives) or the market risk of the UCITS portfolio.

<ESMA\_QUESTION\_EADC\_24>

1. 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>

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<ESMA\_QUESTION\_EADC\_25>

1. [A tapestry of regulatory change- Remarks by Patricia Dunne, Director of Securities and Markets Supervision](https://www.centralbank.ie/news/article/a-tapestry-of-regulatory-change--remarks-by-patricia-dunne--director-of-securities-and-markets-supervision) [↑](#footnote-ref-2)
2. [EFAMA Investments Fund Industry Fact Sheet](https://www.efama.org/sites/default/files/files/monthly-efama-fact-sheet-and-country-data-april-2024.pdf) [↑](#footnote-ref-3)
3. See the Irish Fund’s response to Question 19 for more details. [↑](#footnote-ref-4)
4. [ESMA34-1270380148-1032](https://www.esma.europa.eu/sites/default/files/2024-05/ESMA34-1270380148-1032_Call_for_Evidence_on_the_UCITS_EAD_Review.pdf) [↑](#footnote-ref-5)
5. [Mapping Report on the development of a Financial Literacy Strategy in Ireland](https://www.gov.ie/en/press-release/23ccb-minister-mcgrath-publishes-mapping-report-on-the-development-of-a-financial-literacy-strategy-in-ireland/) [↑](#footnote-ref-6)
6. [ESMA34-39-897 Guidelines on liquidity stress testing in UCITS and AIFs](https://www.esma.europa.eu/document/guidelines-liquidity-stress-testing-in-ucits-and-aifs) [↑](#footnote-ref-7)
7. [DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52021PC0721)  amending Directives 2011/61/EU and 2009/65/EC as regards delegation arrangements, liquidity risk management, supervisory reporting, provision of depositary and custody services and loan origination by alternative investment funds [↑](#footnote-ref-8)
8. [ESMA Guidelines on ETFs and other UCITS issues](https://www.esma.europa.eu/document/guidelines-etfs-and-other-ucits-issues-0) [↑](#footnote-ref-9)
9. [UCITS Financial Indices | Central Bank of Ireland](https://www.centralbank.ie/regulation/industry-market-sectors/funds/ucits/guidance/ucits-financial-indices) [↑](#footnote-ref-10)
10. [COMMISSION DIRECTIVE 2010/43/EU](https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:176:0042:0061:EN:PDF) [↑](#footnote-ref-11)
11. [Guidelines on liquidity stress testing in UCITS and AIFs](https://www.esma.europa.eu/document/guidelines-liquidity-stress-testing-in-ucits-and-aifs) [↑](#footnote-ref-12)
12. [IOSCO Recommendations for Liquidity Risk Management for Collective Investment Schemes](https://www.iosco.org/library/pubdocs/pdf/IOSCOPD590.pdf) [↑](#footnote-ref-13)
13. [Directive (EU) 2024/927](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52021PC0721) (otherwise known as AIFMD II)  [↑](#footnote-ref-14)
14. [Guidelines on liquidity stress testing in UCITS and AIFs](https://www.esma.europa.eu/document/guidelines-liquidity-stress-testing-in-ucits-and-aifs) [↑](#footnote-ref-15)
15. [Irish Funds Response to the Consultation Paper issued by the FSB in relation to Policy Proposals to Enhance Money Market Fund Resilience](https://www.fsb.org/wp-content/uploads/Irish-Funds.pdf) [↑](#footnote-ref-16)
16. [esma\_34-43-880-\_public\_statement\_-\_2020\_csa\_ucits\_liquidity\_risks\_management.pdf (europa.eu)](https://www.esma.europa.eu/sites/default/files/library/esma_34-43-880-_public_statement_-_2020_csa_ucits_liquidity_risks_management.pdf) [↑](#footnote-ref-17)
17. [Irish Funds response to the European Commission MiFID II/MiFIR Consultation Final Response](https://memberportal.irishfunds.ie/file/?id=9c14911d-388d-4830-bf7a-081d5f78e234). [↑](#footnote-ref-18)
18. Per the [Central Bank of Ireland’s UCITS Questions and Answers document](https://www.centralbank.ie/docs/default-source/regulation/industry-market-sectors/funds/ucits/guidance/ucits-qa-39-edition.pdf?sfvrsn=9ceb991d_1) (ID 1092). [↑](#footnote-ref-19)
19. Events such as redemptions/subscriptions would not be considered passive breaches, which presents a challenge for investment managers who must find alternatives to avoid such breaches. In June 2024, the CSSF acknowledged that breaches due to mismatches between the settlement cycles of redemptions versus those of securities could be considered passive breaches. [↑](#footnote-ref-20)
20. [T+1 feedback report shows mixed impacts of shortening the settlement cycle in the EU.](https://www.esma.europa.eu/press-news/esma-news/t1-feedback-report-shows-mixed-impacts-shortening-settlement-cycle-eu) [↑](#footnote-ref-21)
21. [OPINION Article 50(2)(a) of Directive 2009/65/EC](https://www.esma.europa.eu/sites/default/files/library/2015/11/2012-721.pdf) [↑](#footnote-ref-22)
22. As we note in **Question 14 and 15**, the regulatory framework has evolved since 2007 giving rise to a wider variety of CIUs than was available at that time (including AIFs and ELTIFs). [↑](#footnote-ref-23)
23. [Re: 2022 ESMA Common Supervisory Action on Asset Valuation](https://www.centralbank.ie/docs/default-source/regulation/industry-market-sectors/funds/industry-communications/industry-letter-2022-esma-common-supervisory-action-on-asset-valuation.pdf?sfvrsn=2b40621a_5) [↑](#footnote-ref-24)
24. [BaFin Guidance Notice on marketing of EU UCITS in Germany](https://www.bafin.de/SharedDocs/Downloads/EN/Merkblatt/WA/dl_130722_merkbl_310KAGB_wa_en.html) [↑](#footnote-ref-25)
25. [FAQ\_Law\_17\_December\_2010\_171221.pdf (cssf.lu)](https://www.cssf.lu/wp-content/uploads/FAQ_Law_17_December_2010_171221.pdf) [↑](#footnote-ref-26)
26. [Directive - 2011/61 - EN - aifmd - EUR-Lex - European Union](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32011L0061) [↑](#footnote-ref-27)
27. [2015/760 - EN - ELTIF Regulation - EUR-Lex - European Union](https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A32015R0760) [↑](#footnote-ref-28)
28. [OPINION Article 50(2)(a) of Directive 2009/65/EC](https://www.esma.europa.eu/sites/default/files/library/2015/11/2012-721.pdf) [↑](#footnote-ref-29)
29. [ESMA Guidelines on ETFs and other UCITS issues](https://www.esma.europa.eu/document/guidelines-etfs-and-other-ucits-issues-0) [↑](#footnote-ref-30)
30. [Research Paper on Efficient Portfolio Management Techniques: Attribution of profits derived from Securities Lending by UCITS Exchange-Traded Funds](https://betterfinance.eu/wp-content/uploads/BETTER-FINANCE-Research-Paper-Securities-Lending-final-20052019.pdf) [↑](#footnote-ref-31)
31. [ESMA34-43-392 Q&As on the Application of the UCITS Directive (europa.eu)](https://www.esma.europa.eu/sites/default/files/library/esma34_43_392_qa_on_application_of_the_ucits_directive.pdf) – see Question 3 [↑](#footnote-ref-32)
32. [ESMA-2014-0011-01-00 EN (europa.eu)](https://www.esma.europa.eu/sites/default/files/library/2015/11/esma-2014-0011-01-00_en_0.pdf) [↑](#footnote-ref-33)
33. [CESR’s Guidelines on Risk Measurement and the Calculation of Global Exposure and Counterparty Risk for UCITS](https://www.esma.europa.eu/sites/default/files/library/2015/11/10_108.pdf) [↑](#footnote-ref-34)
34. <https://www.esma.europa.eu/sites/default/files/library/esma34-39-897_guidelines_on_liquidity_stress_testing_in_ucits_and_aifs_en.pdf> (V.1.13) [↑](#footnote-ref-35)