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 | World Gold Council |
| Activity | We are a membership organisation that champions the role gold plays as a strategic asset, shaping the future of a responsible and accessible gold supply chain |
| Country / Region | International |

# 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>

The exclusion of gold as an eligible asset under the UCITS Directive is the most pressing issue that needs to be addressed. This exclusion negatively affects investor protection, limits diversification, and encourages outflows of funds to Non-EU capital markets. Allowing UCITS funds to include gold would align with effective investment practices and meet the high demand for gold investment while providing better regulatory oversight and protection for investors.

1. **Investor Protection**

Investors seeking exposure to gold within the EU are forced to invest in Gold Exchange Traded Commodities (Gold ETCs) instead of Gold Exchange Traded Funds (Gold ETFs).

Gold ETCs are less regulated and offer lower transparency and investor protection compared to UCITS funds. Gold ETCs are structured as debt instruments. Notes in a Gold ETC provide investors only with claims against the issuing company while a share in an ETF fund represents a proportional ownership of the fund's gold holdings.

Allowing UCITS funds to invest in gold would also ensure that these investments fall under the stricter regulatory framework of UCITS, further enhancing investor protection.

1. **Diversification**

UCITS funds can invest in various thematic and specialized ETFs but are restricted from holding physical commodities like gold.

This restriction prevents investors from diversifying their portfolios with a highly liquid and low-risk asset like gold.

Gold has performed well over the past 3, 5, 10 and 20 years, despite the strong performance of risk assets. Gold has also been less volatile than many equity indices because of its scale, liquidity and diverse sources of demand, which include investment, technology, jewellery and central banks (see page 4 of the provided presentation or <https://www.gold.org/goldhub/research/relevance-of-gold-as-a-strategic-asset/golds-key-attributes-1-return> ). And last but not least, gold can significantly improve risk-adjusted portfolio returns across various levels of risk, particularly when compared to non-gold portfolios of equivalent expected returns (see pages 7-9 of the provided presentation or <https://www.gold.org/goldhub/research/relevance-of-gold-as-a-strategic-asset/portfolio-impact-1-risk-reward-profile> )

Investor demand for thematic or otherwise specialised UCITS funds has grown strongly over the last years. At the end of June 2024, there were 156 UCITS thematic ETFs totalling US$37.7 billion in assets under management according to Global X, up from nearly zero only ten years ago (Source: <https://globalxetfs.eu/content/files/Monthly-Thematic-UCITS-ETF-Report-June-2024-1.pdf>). In lights of this, the UCITS diversification requirements are not entirely up-to-date and would benefit from a review to align with current practices. Specialised UCITS funds like sector or thematic funds already constitute focused investments options.

Since physical gold is no one’s liability and carries no credit risk, and due to the unique preservation of gold’s value over time, there is no need for diversification requirements by issuer or similar.

1. **Maintaining assets in the EU capital markets**

There is a significant market demand for Gold ETFs, as evidenced by substantial assets under management in Gold ETFs outside the EU, be it in European countries like Switzerland or Liechtenstein or countries in North America or Asia. There are at least 17 Exchange Traded Funds and gold funds in Europe which invest in physical gold: three are domiciled in Liechtenstein and 14 are domiciled in Switzerland. In total they hold more than US$ 23 billion in assets under management. Gold Exchange Traded Funds in North America account even for more than US$ 110 billion in assets under management. Also in Asia, Gold ETFs are prevalent, total market cap is about US$ 14 billion. (Source: <https://www.gold.org/goldhub/research/gold-etfs-holdings-and-flows/2024/07> )

Allowing gold investments under UCITS would cater to the high demand and maximise the retention or repatriation of assets in the EU capital markets.

1. **Economic and Strategic Importance**

Gold is a strategic asset with high liquidity, absence of liability or credit risk, and the ability to preserve value over time. Gold is an important reserve asset, e.g. for central banks, which hold nearly US$ 3 trillion in gold reserves. It enhances portfolios by providing diversification, high liquidity, and improved returns and performance. Recognizing gold as an eligible asset under UCITS would align with its strategic importance in financial markets.

#### **Recommendation**

To address these issues, it is recommended that the UCITS Directive be amended to:

* Include physical gold and gold-backed instruments as eligible assets.
* Allow direct exposures to gold-backed crypto-assets as new, EU-regulated instruments for gold investments.
* Adjust diversification requirements to allow UCITS funds fully backed by gold.

By making these changes, the UCITS framework will be better aligned with modern investment practices, offering enhanced protection, improved diversification, and regulatory consistency across the EU.

This approach would directly respond to the needs of investors and market participants, ensuring the UCITS framework remains relevant and effective in today's evolving financial landscape.

<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>

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<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>

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<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>

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<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>

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<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>

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<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>

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<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>

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<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>

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<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>

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<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>

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<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>

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<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>

In light of shortcomings of delta-one instruments in comparison to direct investments in physical gold (see also response to question 1) we strongly suggest allowing direct investments in physical gold. This is established practice in other jurisdictions like the US or Switzerland for a long time, where gold ETFs hold more than US$ 100 billion in physical gold. We also recommend allowing direct exposures to gold-backed crypto-assets, which adhere to the new EU regulations under MiCAR.

<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>

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<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>

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<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>

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<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>

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<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>

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<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>

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<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>

See table in the Annex

<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>

With regards to gold, delta-one instruments, derivatives or ETNs (in case of gold commonly referred to as gold ETCs) offer lower investor protection than direct investments in physical gold. In addition, direct gold investments are typically the most cost-efficient way to invest in gold.

For example, Gold ETCs are structured as debt instruments. Notes in a Gold ETC provide investors only with claims against the issuing company. Similarly, delta-one instruments or derivatives pose higher risks than direct investments in physical gold, e.g. since the latter is no one’s liability and faces no counterparty or credit risk.

As evidenced by the large amount of Gold ETFs in other jurisdictions like the US and Switzerland, which hold combined significantly more than US$ 100 billion in gold, liquidity is not a concern. UCITS Gold ETFs would typically access the liquidity of the London Bullion Market, which traded close to US$ 80 billion on daily average in 2023.

<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>

As set out in our response to question 1, we strongly suggest allowing direct investments into physical gold under the UCITS framework. This would meet investor demands, increase investor protection and enable better diversification and performance of investor portfolios as well as stronger and more consistent regulation. As stated in our response to question 21, allowing direct in physical gold is often preferrable to indirect investments through delta-one instruments, ETNs or derivatives, since physical gold carries no liability, credit, default, or counterparty risk. We recommend to also allow direct exposures to crypto-assets backed by physical gold and regulated under MiCAR.

<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>

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<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>

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<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>