



**EUROPEAN COMMISSION**

DIRECTORATE-GENERAL FOR FINANCIAL STABILITY, FINANCIAL SERVICES AND CAPITAL MARKETS UNION

Director General

Brussels  
FISMA.C.4/IK/mp(2023)5536037

Ms Verena Ross  
Chair  
European Securities and  
Markets Authority (ESMA)  
201-203 rue de Bercy  
75012 Paris, France

**Subject: Formal request to ESMA for technical advice on the review of Commission Directive 2007/16/EC on UCITS eligible assets**

Dear Ms Ross,

Directive 2009/65/EC on Undertakings for Collective Investment in Transferable Securities (“UCITS Directive”) is a key pillar of the EU Capital Market Union and has created a harmonised and well-functioning regime throughout the European Union for the management and marketing of mutual funds to retail investors.

The success of UCITS as a brand for retail and institutional investors, both within the European Economic Area and globally, is tied to their reputation as sound and well-regulated investment products. In particular, UCITS invest in assets subject to eligibility criteria aimed at ensuring that they are able to meet all their obligations, including in terms of portfolio liquidity, net asset value calculation and limits monitoring.

The scope of UCITS eligible assets is specified in Commission Directive 2007/16/EC of 19 March 2007 (*see* OJ L79, 20.3.2007, p. 11; hereinafter “Eligible Assets Directive”) which, in turn, refers to Directive 85/611/EEC, a previous version of the UCITS Directive. The Eligible Assets Directive being in force since 2007, the Commission deems it important to take stock of the market practices to ensure that the eligibility rules are implemented in a uniform manner in all Member States, also taking into account market and regulatory developments that have occurred over the past 16 years.

The Commission therefore mandates ESMA to carry out an assessment of the implementation of the Eligible Assets Directive in the Member States, to analyse whether any divergences have arisen in this area and to provide the Commission with a set of recommendations on how the Eligible Assets Directive should be revised to keep it in line with market developments. In particular, ESMA should analyse the merits of linking certain definitions and concepts to other pieces of the EU *acquis* given the need to provide greater clarity, legal certainty and uniformity to UCITS management companies and additional

protections to UCITS investors (e.g. MIFID II, EMIR, the Benchmark Regulation or MMFR). ESMA is invited to analyse the consistent application, amongst others, of “delta-one” instruments related provisions, indices, efficient portfolio management (EPM) techniques, the definition of money market instruments as well as the notion of liquidity and presumption thereof in relation to certain transferable securities.

In this context, ESMA is invited to propose clarifications on the key definitions and the criteria against which the eligibility of an asset is assessed. ESMA is also requested to analyse whether and to what extent cross-references to other EU legal frameworks could improve legal clarity and, where appropriate, consistency between these frameworks.

ESMA is also invited to assess the risks and benefits of UCITS gaining exposures to asset classes that are not directly investable for UCITS, e.g. through delta-one instruments, (embedded) derivatives and financial indices. In relation to EPM, ESMA is also invited to advise on possible legislative clarifications to address the shortcomings identified in the context of its supervisory convergence work, notably the 2018 ESMA Peer Review on the Guidelines on ETFs and other UCITS issues<sup>1</sup> and its follow-up work performed in this respect as well as the ESMA Common Supervisory Action (CSA) on costs and fees in 2021<sup>2</sup>.

To this end, ESMA is invited to conduct a data gathering exercise with NCAs, and, where needed, with market participants to gather insights on the manner and the extent to which UCITS have gained direct and indirect exposures to certain asset categories that may give rise to divergent interpretations and/or risk for retail investors (e.g. structured/leveraged loans, catastrophe bonds, emission allowances, commodities, crypto assets, unlisted equities, and other relevant asset classes). ESMA should use the technical input and the data by the NCAs and collect, where needed, the empirical evidence and data to be provided by NCAs to the extent required and deemed necessary by ESMA. NCAs are urged to fully cooperate with ESMA in providing the requested data and to dedicate sufficient time and effort to ensure good-quality input as per ESMA’s request.

Where the definitions and eligibility criteria proposed by ESMA might allow for exposure to the abovementioned asset classes, ESMA shall assess whether these exposures are adequate in the context of the UCITS taking into account the characteristics of the underlying market (e.g. availability of valuation, liquidity, safekeeping, etc.). ESMA is invited to rely upon and provide the Commission services with up-to-date data that would allow the latter to obtain insights into the absolute and relative size of such asset classes in the context of the UCITS market. In particular, ESMA should make a preliminary assessment of the impacts of the proposed regulatory adjustments, if any, taking into account the characteristics of the underlying market (e.g. availability of valuation, liquidity, assets safekeeping, etc).

ESMA is also invited, in its technical advice, to recommend which changes, if any, would be appropriate and could be achieved at Level 2 level and, if appropriate, which Level 1 amendments would appear appropriate and necessary in the medium and long-term.

To allow for a comprehensive public consultation, ESMA is requested to deliver its technical advice by **31 October 2024**.

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<sup>1</sup> [https://www.esma.europa.eu/sites/default/files/library/esma42-111-4479\\_final\\_peer\\_review\\_report\\_-\\_guidelines\\_on\\_etfs.pdf](https://www.esma.europa.eu/sites/default/files/library/esma42-111-4479_final_peer_review_report_-_guidelines_on_etfs.pdf).

<sup>2</sup> [https://www.esma.europa.eu/sites/default/files/library/esma34-45-1673\\_final\\_report\\_on\\_the\\_2021\\_csa\\_on\\_costs\\_and\\_fees.pdf](https://www.esma.europa.eu/sites/default/files/library/esma34-45-1673_final_report_on_the_2021_csa_on_costs_and_fees.pdf).

To ensure legal certainty of the application of the UCITS rules and protect the reputation of the UCITS brand, both within the European Union and in third countries, I would like to emphasise that this request for a technical advice should aim to preserve and strengthen the well-functioning of the UCITS framework and the operation of the UCITS management companies in the best interest of investors, as well as the quality of investment products offered to retail clients.

Any respective discussions at ESMA's level in connection herewith or the technical advice delivered by ESMA shall not be used, referred to or relied upon as representing an official position or pre-judge any possible action of the European Commission.

I look forward to receiving ESMA's input and remain at your disposal for any questions.

Yours sincerely,

Electronically signed

John BERRIGAN

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