

SUBMITTED VIA WEB FORM TO: <https://www.esma.europa.eu/>

To whom it may concern,

Re: Call for Evidence on the review of the Undertakings for the Collective Investment in Transferable Securities (UCITS) Eligible Assets Directive

About Global Digital Finance (GDF)

GDF is the leading global members association advocating and accelerating the adoption of best practices for crypto and digital assets. GDF's mission is to promote and facilitate greater adoption of market standards for digital assets through the development of best practices and governance standards by convening industry, policymakers, and regulators.

The input to this response has been curated through a series of member discussions and roundtables, and GDF is grateful to its members who have taken part.

As always, GDF remains at your disposal for any further questions or clarifications you may have, and we would welcome a meeting with you to further discuss these matters in more detail with our members.

Yours faithfully,
Elise Soucie – Executive Director – GDF



Response to the Call for Evidence report: Executive Summary

GDF convened its European Union (EU) Working Group to analyse the European Securities & Markets Authority (ESMA) Call for Evidence on the review of the Undertakings for the Collective Investment in Transferable Securities (UCITS) Eligible Assets Directive. Please note that as this response was developed in collaboration with GDF members, as well as community partners, that portions of our response may be similar or verbatim to individual member responses.

Overall, GDF is supportive of the aim of the proposals made in the Call for Evidence and of ESMA's intent of providing much needed clarity to the market. We appreciate the timing of the Call for Evidence, in particular as the Markets in Crypto Assets Regulation (MiCAR) is now beginning to be implemented in the EU, bringing crypto-assets within the regulatory perimeter. GDF believes that including crypto-assets within regulated financial markets, including UCITS is an important step towards building a comprehensive EU global framework for digital assets. As such, the response to the Call for Evidence strongly supports the inclusion of crypto-assets within the categories of eligible assets within UCITS.

GDF has worked with our members to provide a constructive assessment, and technical analysis as to why crypto-assets should be eligible assets within UCITS. Through this process, the EU Working Group has identified key areas that may require further consideration and aimed to provide feedback on areas where risks can be mitigated should crypto-assets be included within UCITS. The core areas identified are:

- 1. Support for ESMA Enabling the Inclusion of Crypto and Digital Assets Within UCITS Eligible Assets**
- 2. Encouragement of Further ESMA Level Guidance, Especially for Unique Asset Classes Such as Digital Assets for Consistent NCA Implementation**
- 3. Further Standardisation of the Definition of 'Liquidity' within UCITS Guidance Encouraged**

1. Support for ESMA Enabling the Inclusion of Crypto and Digital Assets Within UCITS Eligible Assets

GDF strongly encourages ESMA in the UCITS EAD to clarify crypto-asset eligibility within UCITS. GDF members feel that providing such clarity would be in support of ESMA's goals of improving investor protection, clarity, and supervisory convergence.

Clear guidelines with respect to the admissibility of crypto-assets under UCITS, will bring clarity to the market and provide the necessary requirements so that investors receive appropriate disclosures for new types of assets. This will in turn enhance greater transparency across the market.

Furthermore, this would also be beneficial as the EU continues to implement MiCA across member states. Clear guidance around admissibility of crypto-assets will help eliminate some ambiguities, enabling more consistent application across EU member states, alongside other



crypto-asset provisions. Common standards for crypto-asset inclusion will then in turn also support more consistent supervision at a national level, as well as cross-border cooperation between national competent authorities (NCAs) mitigating the risk of divergent practices and misinterpretation should NCAs be required to instead consider the inclusion of crypto-assets individually, which would also result in a fragmented jurisdictional approach.

2. Encouragement of Further ESMA Level Guidance, Especially for Unique Asset Classes Such as Digital Assets for Consistent NCA Implementation

Specifically, GDF would support ESMA defining clear and further detailed criteria for index eligibility, including acceptable levels of leverage, transparency requirements, and sector exposures. GDF would also support the development of guidance around disclosures regarding the composition, methodology, and risk factors of indices used in UCITS funds. For consistent NCA implementation, ESMA could consider producing guidance or a Q&A on standardised assessment procedures for NCAs to evaluate and approve indices, ensuring greater consistency in their application across the EU. GDF would also support the guidance being clear and proportionate, taking account of unique asset classes where appropriate as well as considering how UCITS requirements may interact with other frameworks such as MiFID II and MiCA.

3. Further Standardisation of the Definition of ‘Liquidity’ within UCITS Guidance Encouraged

GDF would support ESMA in developing a clear, standardized definition of "liquidity" and "liquid financial assets" that is applicable for consistent implementation across EU member states. This could also be supported by the development of guidance for standardised assessment of the liquidity of various asset classes, considering key factors such as market depth, trading volume, and bid-ask spreads. For unique markets such as digital and crypto-assets, it may be beneficial for ESMA to consider specifying different liquidity requirements for these asset classes based on their inherent liquidity characteristics, marketability, and trading volumes.

Response to the Call for Evidence paper (CfE): Questions for Public Consultation

Please note that given our focus areas set out in the executive summary, we have not responded to each question in the ESMA Call for Evidence. Instead, we have provided feedback in input on the specific questions and chapters that are relevant to the key areas. Where we have not provided further feedback, we have no comment on the proposals set out.

Q1: 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?

As set out in our cover letter, GDF is the leading global members association advocating and accelerating the adoption of best practices for crypto and digital assets. As such, we would encourage ESMA in the UCITS EAD to clarify crypto-asset eligibility within UCITS. GDF members feel that providing such clarity would be in support of ESMA’s goals of improving investor protection, clarity and supervisory convergence.

Clear guidelines with respect to the admissibility of crypto-assets under UCITS, will bring clarity to the market and provide the necessary requirements so that investors receive appropriate disclosures for new types of assets. This will in turn enhance greater transparency across the market.



Furthermore, this would also be beneficial as the EU continues to implement MiCA across member states. Clear guidance around admissibility of crypto-assets will help eliminate some ambiguities, enabling more consistent application across EU member states, alongside other crypto-asset provisions. Common standards for crypto-asset inclusion will then in turn also support more consistent supervision at a national level, as well as cross-border cooperation between national competent authorities mitigating the risk of divergent practices and misinterpretation should NCAs be required to instead consider the inclusion of crypto-assets individually, which would also result in a fragmented jurisdictional approach.

Q2: 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.

GDF would note that some recurring issues market participants have often noted are some of the challenges with the ambiguity in eligibility criteria for eligible assets, as well as some uncertainty at times regarding which financial indices meet the UCITS eligibility criteria, which can have the unintended consequence of inconsistent application of UCITS requirements across EU member states.

To mitigate these risks, GDF is supportive of ESMA defining clear and further detailed criteria for index eligibility, including acceptable levels of leverage, transparency requirements, and sector exposures. GDF would also support the development of guidance around disclosures regarding the composition, methodology, and risk factors of indices used in UCITS funds. For consistent NCA implementation, EMSA could consider producing guidance or a Q&A on standardised assessment procedures for NCAs to evaluate and approve indices, ensuring greater consistency in their application across the EU. This could be further supported by implementing regular reviews of eligible indices to adapt to market developments and emerging risks, ensuring the framework remains, future-proof, relevant and robust.

Q3: 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.

Q4: 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.

GDF would note that lack of clear, uniform definitions for "liquidity" and "liquid financial assets" could lead to the unintended consequence of inconsistent interpretations among different NCAs and market participants. Furthermore, divergent standards and practices in assessing the liquidity of different asset classes, particularly in less traditional or emerging markets could also lead to fragmentation across the EU. For this reason, GDF strongly supports



consistent guidance from ESMA to lead to greater consistency, as well as clear and uniform definitions particularly with regards to how the UCITS guidance would interact with these same definitions under MiCA and MIFID II.

For example, GDF would support ESMA in developing a clear, standardized definition of "liquidity" and "liquid financial assets" that is applicable for consistent implementation across EU member states. This could also be supported by the development of guidance for standardised assessment of the liquidity of various asset classes, considering key factors such as market depth, trading volume, and bid-ask spreads. For unique markets such as digital and crypto-assets, it may be beneficial for ESMA to consider specifying different liquidity requirements for these asset classes based on their inherent liquidity characteristics, marketability, and trading volumes.

Q5: 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.

Q6: 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.

Q7: 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.

Yes, GDF would be supportive of foreign currency inclusion. This would also support the competitiveness aims of the EU and could be beneficial particularly in light of new types of foreign currencies such as stablecoins denominated in USD, or CBDCs.

Q8: 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.

Q9: 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.

Q10: 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.

Q11: 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.

Q12: 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.

Q13: 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.

Q14: 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.

Q15: 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.

Q16: 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.

Q17: 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?

Q18: 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.

Q19: 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.

Q20: 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.

Q21: 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.

Q22: 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,



Q23: 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.

Q24: 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.

Q25: 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.