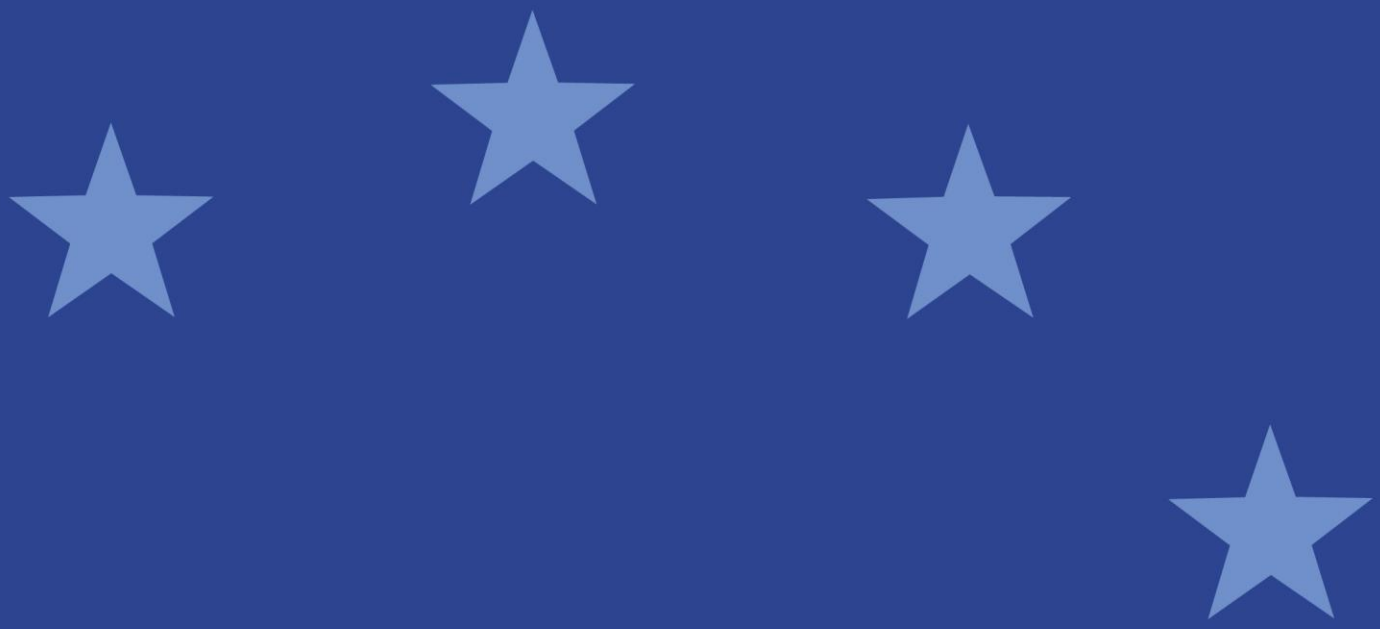
esma European Securities and Markets Authority

Reply form for the Technical Advice the on delegated acts required by the UCITS V Directive



26 September 2014

European Securities and Markets Authority

Date: 26 September 2014

Responding to this paper

The European Securities and Markets Authority (ESMA) invites responses to the specific questions listed in the ESMA Consultation Paper - ESMA's technical advice to the European Commission on delegated acts required by the UCITS V Directive, published on the ESMA website (here).

Instructions

Please note that, in order to facilitate the analysis of the large number of responses expected, you are requested to use this file to send your response to ESMA so as to allow us to process it properly. Therefore, please follow the instructions described below:

i. use this form and send your responses in Word format;

ii. do not remove the tags of type < ESMA_UCITS_QUESTION_1> - i.e. the response to one question has to be framed by the 2 tags corresponding to the question; and

iii. if you do not have a response to a question, do not delete it and leave the text "TYPE YOUR TEXT HERE" between the tags.

Responses are most helpful:

i. if they respond to the question stated;

ii. contain a clear rationale, including on any related costs and benefits; and

iii. describe any alternatives that ESMA should consider

Given the breadth of issues covered, ESMA expects and encourages respondents to specially answer those questions relevant to their business, interest and experience.

To help you navigate this document more easily, bookmarks are available in "Navigation Pane" for Word 2010 and in "Document Map" for Word 2007.

Responses must reach us by **24 October 2014**.

All contributions should be submitted online at www.esma.europa.eu under the heading 'Your input/Consultations'.

Publication of responses

All contributions received will be published following the end of the consultation period, unless otherwise requested. **Please clearly indicate by ticking the appropriate checkbox in the website submission form if you do not wish your contribution to be publicly disclosed. A standard confidentiality statement in an email message will not be treated as a request for non-disclosure.** Note also that 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 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 under the heading 'Disclaimer'.

III. Advice on the insolvency protection of UCITS assets when delegating safekeeping (Art. 22a(3)(e)[1] and 26b(e) UCITS V)

Q1: Do you agree that the steps to be taken by the third party are ultimately intended to ensure that the level of segregation foreseen under 22a(3)(d) of the UCITS Directive is recognised in the context of an insolvency proceeding involving the third party?

<ESMA_UCITS_QUESTION_1>
The European Association of Co-operative Banks (EACB)[2] would support ESMA proposition. However, it should be highlighted that the rational of Art. 22a (3) (d) includes, but is not limited to the establishment of segregated accounts. Acting as a depositary and / or its delegated third party means to provide an ancillary (investment) service according to Annex I Section B (1) of Directive 2014/65/EU on markets in financial instruments.

Practical experience shows that the majority of the depositaries in the EU – credit institutions and investment firms – also provide investment services according to Annex I Section A of Directive 2014/65/EU and therefore are subject to this Directive regarding the depositary business (Art. 6 (1) of this Directive excludes the granting of an authorisation solely for the provision of ancillary services. Art. 1 (6) (a) of the UCITS V Directive generally confirms this).

Therefore, reference is made to the specific requirements of its Art. 16 Organisational Requirements, especially to its sections (8) – (10) and (11) subpara. 2 MiFID II and the corresponding 2. Level CP ESMA/2014/549 regarding Safeguarding of client assets. We consider that the upcoming relevant final technical advice should also be consider in the context of the present technical advice.

Moreover, we consider that confusion could arise from the use of the term 'third party' where sub-delegation takes place. From the wording of Art 22a and the last paragraph of Art 22a(3) derives that 'third party' means the party or parties which the depositary appoints as custodian(s). If that custodian (the 'third party') then delegates to another party, that relationship is captured by the last paragraph of 22a(3) and the third party has to ensure that its sub-delegates meet all the requirements of Art 22a(3).
<ESMA_UCITS_QUESTION_1>

Q2: Do you consider that the level of segregation foreseen under Art 22a(3)(d) of the UCITS Directive should protect UCITS assets from claims by creditors of an insolvent third party which had been delegated the safekeeping of the assets by the UCITS' depositary?

<ESMA_UCITS_QUESTION_2>
As already referred to above in Q1, in order to provide a European level playing field for depositaries, to avoid different supervisory and organisational standards regarding client asset protection and different high-cost modified depositary processes for each MiFID II, AIFM- and UCITS-Directive, the organisational requirements and codes of conduct of MiFID II should be taken as the basis. There is no reason to establish different basic standards for safeguarding client assets / financial instruments of individual retail

[1] Article 22a(3)(d) in the text of UCITS V published in the Official Journal.
[2] The European Association of Co-operative Banks (EACB) is the voice of the co-operative banks in Europe. It represents, promotes and defends the common interests of its 29 member institutions and of co-operative banks in general. Co-operative banks form decentralised networks which are subject to banking as well as co-operative legislation. Democracy, transparency and proximity are the three key characteristics of the co-operative banks' business model. With 3,700 locally operating banks and 71,000 outlets co-operative banks are widely represented throughout the enlarged European Union, playing a major role in the financial and economic system. They have a long tradition in serving 215 million customers, mainly consumers, retailers and communities. The co-operative banks in Europe represent 56 million members and 850,000 employees and have a total average market share of about 20%.
For further details, please visit www.eacb.coop

investors, professional investors, AIF- and UCITS-Funds. The same stands for the IOSCO Recommendations to the extend that they are reflected in MiFID II.

Having said that we welcome the continuous support of a harmonisation at International level (i.e. IOSCO level) of the insolvency laws in third country jurisdictions as regards their effects on assets segregation by ESMA and the European Commission.

Therefore, the rules of UCITS V Directive should be clarified consistently with MIFID II and AIFMD were ever possible. Additional rules should be established only where Level I provisions are mandatory.
<ESMA_UCITS_QUESTION_2>

Q3: Are there other measures which could also help achieve this objective?

<ESMA_UCITS_QUESTION_3>
As already noted above in our responses to above in Q1 and Q2 above, the specific requirements of its Art. 16 Organisational Requirements (especially sections (8) – (10) and (11) subpara. 2 MiFID II and the corresponding 2. Level CP ESMA/2014/549) regarding safeguarding of client assets should work as a basis. Regarding the unavailability of assets of a UCITS in case of an insolvency of the depositary / the third party, especially the questions of custody liens and similar rights should be taken into account .

Moreover, we consider that these steps proposed are not sufficient to protect the UCITS' assets in the event that the local law ceases to recognise the effects of segregation.

Having said that, we consider that once the depositary becomes aware that segregation is no longer sufficient it must immediately inform the Competent Authority of the UCITS in order to ensure that the Management Company or UCITS Board- if self-managed-, takes appropriate and immediate action.

A security is issued by an entity in the country where it is located and it is not possible for the depositary to select a third party which is not located in this country. The selection of any investment, and therefore of its place of issuance , is within the sole remit of the asset managers functions, acting under their fiduciary capacities , for the benefit of the investors. In such a situation there would be only two ways to protect the securities of the UCITS against claims of creditors of a third party: i) to dispose of these securities or ii) these securities should be converted from a bearer form to a registered form (a security that is registered in the books of the issuer in the name of the owner).
<ESMA_UCITS_QUESTION_3>

Q4: Do you agree with the steps to be taken by the third party as identified above? If not, please explain the reasons.

<ESMA_UCITS_QUESTION_4>
As already noted above in our responses to above in Q1 and Q2 above, the specific requirements of its Art. 16 Organisational Requirements (especially sections (8) – (10) and (11) subpara. 2 MiFID II and the corresponding 2. Level CP ESMA/2014/549) regarding safeguarding of client assets should work as a basis.

Moreover, it is not uncommon for a depositary to delegate custody to a global custodian (the "third party") who, in turn, may delegate to other parties. Thus, for the sake of clarity, we recommend that the draft advice includes a paragraph to the effect that if the third party to whom the depositary has delegated functions referred to in Art 22(5), successively sub-delegates those functions, such sub-delegation is subject to the same requirements (ie application mutatis mutandis). Whilst this is already the case by virtue of the last paragraph of Art 22a(3), it would be helpful for this clarification to be included in L2 measures. This would also be consistent with the approach taken in AIFMR (eg Art 98(4)).
<ESMA_UCITS_QUESTION_4>

Q5: Do you consider that there are any specific difficulties that may arise in verifying the applicable insolvency regime that makes the proposed rules difficult to be complied with?

In particular, do you consider the requirement for the third party located in a jurisdiction outside the Union to obtain independent legal advice could give rise to specific issues?

<ESMA_UCITS_QUESTION_5>
Yes we do. It may depend upon how complex the applicable insolvency regime is , whether there is an existing jurisprudence or how certain the legal advice is.

It is also important to be clear what entity constitutes the 'third party'. As we recommend in response to Q 4, we recommend that the draft advice includes a paragraph to the effect that if the third party to whom the depositary has delegated functions referred to in Art 22(5), in turn sub-delegates those functions, such sub-delegation is subject to the same requirements. Whilst this is already the case by virtue of the last paragraph of Art 22a(3), it would be helpful for it to be included in L2 measures. This would also be consistent with the approach taken in AIFMR (eg Art 98(4)).
<ESMA_UCITS_QUESTION_5>

Q6: Do you expect a significant increase in terms of costs that would be faced by the third party delegated entities located in jurisdictions outside the Union in order to obtain independent legal advice on the applicable insolvency regime? If yes, please provide any available data and/or estimation.

<ESMA_UCITS_QUESTION_6>
Yes, the EACB considers that costs will increase and could be substantial, in particular since the legal advice will be needed for any jurisdiction outside the Union where financial instruments are held in custody. It should be kept in mind that Art. 24 UCITS V Directive does not restrict the liability of the depositary to valid independent legal advice and / or any other specific.
<ESMA_UCITS_QUESTION_6>

Q7: Would you suggest requiring the third party to take any further steps which are not foreseen in the draft advice?

<ESMA_UCITS_QUESTION_7>
In that regards, the EACB would only like to highlight that Art. 24 UCITS V Directive does not restrict the liability of the depositary to valid independent legal advice and / or any other specific and exhaustive precautions..
<ESMA_UCITS_QUESTION_7>

Q8: Should any specific consideration be given to the scenario where the third party further sub-delegates the safe-keeping of the UCITS' assets in accordance with Article 22a(3), last sub-paragraph of the UCITS Directive (as inserted by UCITS V)? Should the third party take any additional/different steps or measures in this case?

<ESMA_UCITS_QUESTION_8>
Yes, as already stated in our responses to questions 4,5 and 7. We recommend that the draft advice includes a paragraph to the effect that if the third party to whom the depositary has delegated functions referred to in Art 22(5), successively sub-delegates those functions, such sub-delegation is subject to the same requirements (ie application mutatis mutandis). Whilst this is already the case by virtue of the last paragraph of Art 22a(3), it would be helpful for this clarification to be included in L2 measures. This would also be consistent with the approach taken in AIFMR (e.g. Art 98(4)).

Moreover, we would recommend that it is explicitly stated that any sub-delegation requires the prior written consent of the depositary and must be subject to the same technical, legal and supervisory conditions and quality as agreed and practised between the depositary and the third party. There cannot be different terms and conditions in a chain of depositaries. Sub-delegations should only be admissible in

case of local mandatory law or covenants. This should be in the interest of every depository being subject to Art. 24 UCITS V Directive.
<ESMA_UCITS_QUESTION_8>

Q9: Do you agree with the steps to be taken by the depositary as identified above? If not, please explain the reasons.

<ESMA_UCITS_QUESTION_9>
No, the EACB does not agree with the proposed steps. A situation could arise where the only appropriate action is either to dispose of the financial instruments or to dispose of these securities or to convert them from a bearer form to a registered form. If the depositary informs the Management Company or UCITS Board -if self-managed- accordingly and the later disregards this the only remaining appropriate action is notifying the UCITS's Competent Authority. We would, however, propose that this notification to the Competent Authority takes place simultaneously with the notification to the Management Company/UCITS Board is notified given the importance of UCITS. Such notification to the UCITS's Competent Authority should be sufficient to discharge the depositary of its liability, as the latter will have made all reasonable efforts. It is reasonable to expect the Competent Authority to have a responsibility to ensure that the Management Company/UCITS Board is acting in a manner that is not going to cause investor detriment or potentially create greater systemic risk. This approach also recognises the fact that it is the Management Company/UCITS Board who has responsibility for portfolio management and who ultimately will make the decision whether or not to act upon the alert from the depositary. In addition this approach is also consistent with the current arrangements for the roles and responsibilities of public agencies charged with overseeing markets including funds.

In any other case, the depositary is borne with unlimited liability for something it made all reasonable efforts to address until the time it is able to terminate the contract.
It is also important to take into account the fiduciary role of the Management Company/UCITS Board. It is the Management Company/UCITS Board, rather than the depositary, who is responsible for making investment decisions for the UCITS and must take swift steps to act upon the information received from the depositary. Therefore, upon receipt of such notification, the burden of proof should lie with the Management Company/UCITS Board to demonstrate that any steps taken are to the best interests of the UCITS.

We strongly recommend that ESMA develops guidelines for Management Company/UCITS Board and Competent Authorities on the action that should be taken in the event that the depositary makes a notification that it has become aware that the applicable insolvency laws no longer guarantees the segregation of UCITS assets in the event of the insolvency of the entity holding the financial instruments.
<ESMA_UCITS_QUESTION_9>

Q10: Do you expect any significant one-off and ongoing compliance costs for depositaries in order to take the steps identified above? If yes, please provide any available data and/or estimation.

<ESMA_UCITS_QUESTION_10>
Yes, the EACB expects substantial cost as in order to comply with these requirements contacts will need to be reviewed -both as between the depositary and the third party, and between the third and any entity to which it delegates custody.
<ESMA_UCITS_QUESTION_10>

Q11: Would you suggest requiring the depositary to take any further steps which are not foreseen in the draft advice?

<ESMA_UCITS_QUESTION_11>
Yes, we do. Please refer to our responses to Q 3 and Q9.
<ESMA_UCITS_QUESTION_11>

Q12: Which measures do you think should be taken by the depositary and/or the investment company/management company in the best interest of the investors once the depositary has informed the investment company or the management company on behalf of the UCITS that the segregation of the UCITS' assets in the event of insolvency of the third party is no longer guaranteed in a given jurisdiction located outside the Union? Would the transfer of the relevant UCITS' assets held by the third party in a non-EU jurisdiction to another (EU or non-EU) jurisdiction which recognises the segregation of the UCITS' assets in the event of insolvency of the third party/depositary be a possible measure?

<ESMA_UCITS_QUESTION_12>
Such measures are provided in our responses to Q 3 and Q9 above.

ESMA asks whether the transfer of the relevant UCITS' assets held by the third party in a non-EU jurisdiction to another (EU or non-EU) jurisdiction which recognises the segregation of the UCITS' assets in the event of insolvency of the third party/depositary could be a possible measure. In principle it is a decision of the UCITS manager how to cope with such a situation (as referred to above in Q9). If the relevant UCITS' assets could be transferred to another jurisdiction that recognises the segregation in an insolvency proceeding, this would be a possible measure. However, the members of EACB are not certain that this would be possible since a security is issued by an entity in a country where it is located and it is not possible for the depositary to select a third party which is not located in this country.
<ESMA_UCITS_QUESTION_12>

IV. Advice on the independence requirement (Art. 25(2) and 26(b)(h) UCITS V)

Q13: Do you agree with the identified links that may jeopardise the independence of the Relevant Entities? If not, please explain the reasons.

<ESMA_UCITS_QUESTION_13>
By way of introduction and from a purely legal perspective, the EACB[3] strongly disagree with the scope of the mandate given by the European Commission to ESMA concerning the conditions for fulfilling the independence requirement referred to in Article 25(2) of the UCITS V Directive.

As it is clearly stated in the new article 26b (h) of the UCITS V Directive, which defines the scope of the Commission's empowerment to adopt delegated acts, the conditions for the independence of the depositary must be founded upon a legal basis laid down in article 25 (2) which provides that the management company and the depositary have to "act honestly, fairly, independently and solely in the interest of the UCITS and the investors of the UCITS [...].

The essential precondition to qualify as UCITS depositary is to not simultaneously act as management company and / or investment company, these functions being mutually exclusive.
Furthermore a UCITS depositary **shall not carry out activities** (relating to the UCITS and / or the management company) **on behalf of the UCITS** that may create the defined conflict of interest, unless

[3] The European Association of Co-operative Banks (EACB) is the voice of the co-operative banks in Europe. It represents, promotes and defends the common interests of its 29 member institutions and of co-operative banks in general. Co-operative banks form decentralised networks which are subject to banking as well as co-operative legislation. Democracy, transparency and proximity are the three key characteristics of the co-operative banks' business model. With 3,700 locally operating banks and 71,000 outlets co-operative banks are widely represented throughout the enlarged European Union, playing a major role in the financial and economic system. They have a long tradition in serving 215 million customers, mainly consumers, retailers and communities. The co-operative banks in Europe represent 56 million members and 850,000 employees and have a total average market share of about 20%.
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the potentially therewith connected conflicts are properly identified, managed, monitored and disclosed to the investors.

These two requirements reflect the general condition to act solely in the interest of the UCITS and its investors. Independence therefore means that there are no effective influences of whatever kind that jeopardise the execution of the depository function solely in the interest of the UCITS and its investors.

This means that a depositary has to build up a separate internal operative and hierarchical organisation for the UCITS function which is independently managed and led. This internally separate function is prohibited to perform any other tasks that might create conflicts of interest.

According to our opinion Option 1 is not within the wording of Art. 25: Art. 25 does not generally prohibit that the depositary carries out functions on behalf of the UCITS or the management company, but prohibits it in case this would lead to conflicts of interests among UCITS, investors and depositary and – in addition (as a second condition) – these conflicts are not identified, monitored, managed and disclosed to the investors of the UCITS. In addition, we consider it has been the aim of the legislator to harmonise UCITS and AIF- rules in that regard, since the wording concerning the independence requirement in the AIFMD and UCITS V is identical. Therefore, we assume that a different approach was not intended by the legislators.

The EACB would also like to draw your attention to the preliminary approach of IOSCO on the adequate separation in the activities of the Relevant Entities, as reflected in the consultation report on Principles regarding the Custody of Collective Investment Schemes' Assets[4]. In particular, according to draft Principle 4 "the custodian should be functionally independent from the responsible entity" this requirement being distinguished from a structural or legal independence.

We are concerned that the outright prohibition of cross-shareholdings/group inclusion, goes far beyond the objectives and the legal basis set out in the level 1 of the UCITS V directive, and we are convinced that the proposed recommendations will not achieve the final objective of higher investor protection. To the contrary they will rather lead to disproportionate costs and have a substantive impact on the existing shareholding structures of management companies and depositaries in Europe (please refer to our response to Q22).

Thus we urge ESMA to make sure that its final recommendations are in line with Level-1 text and which are proportionate and do not go further than is required to achieve the stated objective, which is to ensure that both the management company and the depositary have specific safeguards against conflicts of interest to allow for the independent performance of their activities. This is the reason why we strongly disagree with the cross-shareholdings/group inclusion as identified links which may jeopardise the independence of the Relevant Entities where an adequate conflict of interest policy is in place.

Many financial groups have developed asset management and depositary bank businesses which represent a significant share of the global market of depositaries of UCITS. This is indeed a common practice in many European Member States, where financial groups are active both in asset management and depositary activities, providing a full range of services to UCITS funds. The prohibition of cross-shareholding (1st option) would imply the legal separation of a large number of entities, in several Member States with a significant share in UCITS market such as France, Germany, Italy, Luxembourg, Austria, Belgium, Denmark, and Sweden.

We strongly believe that this long established market practice should not be restricted by any level – 2 measures for the following reasons:

[4] http://www.iosco.org/library/pubdocs/pdf/IOSCOPD454.pdf

1. The absence of evidenced market failure: No market failure of UCITS / depositary has occurred and this is an evidence of the efficiency of the established system in Europe. The Madoff scandal was not UCITS related nor was it connected to asset management and funds depositories belonging to the same financial group (there was only a custodian with a "technical" safekeeping function). However, it is recognised that a better clarification and harmonisation of depositary duties and liability regime were necessary. These issues were adequately addressed in the AIFMD. The AIFM level1 and level 2 establish strict requirements with regard to oversight duties, asset segregation, due diligence, and the liability regime for depositories. In addition AIFMD Article 21 4 (a) provides that an AIFM shall not act as a depositary. AIFMD does not impose additional requirements.

2. The new UCITS regulatory framework will provide investors with a greater level of protection:
   - The strict liability regime of the depository in UCITS V goes even further than AIFMD as the depositary's liability cannot be contractually waived. Depositaries are regulated entities, must comply with stringent eligibility criteria and are subject to ongoing supervision. Article 5 of the current UCITS IV Directive, requires that "The competent authorities of the UCITS home Member State shall not authorise a UCITS if the directors of the depositary are not of sufficiently good repute or are not sufficiently experienced also in relation to the type of UCITS to be managed (.....) . Directors shall mean those persons who, under the law or the instruments of incorporation, represent the depositary, or who effectively determine the policy of the depositary."

   - Depositories are required to have in place and implement strict and detailed internal procedures for the prevention of conflicts of interest. They are also subject to a regular internal control process for the adequacy of resources and competences.

   In addition, for depositaries subject to MIFID, MIFID reporting obligations include; on an annual basis, specific reporting on the safeguard of assets performed by an independent audit firm.

<ESMA_UCITS_QUESTION_13>

Q14: Do you consider that any additional links should be taken into account such as, for instance, the existence of any contractual commitment or other relationship which would affect the independence of the Relevant Entities? If yes, please provide details.

<ESMA_UCITS_QUESTION_14>
No, we do not consider that any additional links should be taken into account. Please refer to our response to Q 13.
<ESMA_UCITS_QUESTION_14>

Q15: Do you consider that the cumulative presence of all or some of the identified links is necessary to jeopardise the independence of the Relevant Entities or the presence of any of these links is sufficient to determine a lack of independence?

<ESMA_UCITS_QUESTION_15>
Please refer to our response to Q 13. We are strongly opposed to a ban of the cross-shareholdings/group inclusion links as it cannot predetermine a lack of independence of the Relevant Entities.
<ESMA_UCITS_QUESTION_15>

Q16: Do you agree with the proposed option to ensure the separation of the management bodies/bodies in charge of the supervisory functions of the Relevant Entities?

Do you have any alternative options to suggest, taking into account those identified under paragraph 47?

<ESMA_UCITS_QUESTION_16>

We agree with the proposed option to ensure the separation of the management bodies/bodies in charge of the supervisory functions of each entity by prohibiting any member of the management body of one of the relevant entities from being also a member of the management body or employee of the other relevant entity.
<ESMA_UCITS_QUESTION_16>

Q17: Do you consider that the cap of one third of members of the body in charge of the supervisory functions of one of the Relevant Entities to also be members of the management body, the body in charge of the supervisory functions or employees of the other Relevant Entity is appropriate? Would you suggest any alternative percentage? If yes, please provide the reasons why.

<ESMA_UCITS_QUESTION_17>
Please refer to our response to Q 13. We could agree that there should be a less stringent rule for the members of the body in charge of the supervisory functions for entities, which have a dual structure (i.e. the body in charge of the supervisory functions is different from the body in charge of the managerial functions). We believe that there should be a cap which should not be higher than the cap of one third of members of the body in charge of the supervisory functions of one of the Relevant Entities to also be members of the management body, the body in charge of the supervisory functions or employees of the other relevant entity.
<ESMA_UCITS_QUESTION_17>

Q18: Do you have knowledge of any restructuring in the composition of the management bodies/bodies in charge of the supervisory functions of any Relevant Entities that would be triggered by the identified option? If yes, please provide data and an estimation of the one-off and ongoing costs that would be incurred.

<ESMA_UCITS_QUESTION_18>
Comparing both options on cross-shareholding, we would suggest the adoption of the common management / supervision option since it is likely to lead to limited additional costs.
<ESMA_UCITS_QUESTION_18>

Q19: Which of the two identified options do you prefer? Would you suggest any alternative option? If yes, please provide details.

<ESMA_UCITS_QUESTION_19>
For the reasons set out in our response to question 13, we would reject the first option as unacceptable and potentially destabilising for the banking industry in the EU. The principle of proportionality is intended to ensure that regulatory measures do not go further than what is required to achieve the set objective, which is to ensure that both the management company and the depositary have specific safeguards against conflicts of interest to allow for the independent performance of their activities. We support the second option, which aims at harmonising governance and organizational arrangements. For our complete views on Option 2 please refer to our answers to Q20- Q21.
<ESMA_UCITS_QUESTION_19>

Q20: Under the second option, do you consider that it would be appropriate to require that – whenever the Relevant Entities are part of the same group – at least one third of the members of the management body of the management company/investment company and depositary should be independent? Would you suggest any alternative percentage? If yes, please provide the reasons why.

<ESMA_UCITS_QUESTION_20>
As noted in our response to Q 13 this proposal is inconsistent with level-1 regulation. We do not support the requirement of at least one third of the members of the management body of both entities to be inde-

pendent. This would raise many significant practical issues particularly for small structures and structures with joint or multiple shareholdings. An additional operational hurdle would also be the regulatory limits imposed on the number of directorships held by directors.
<ESMA_UCITS_QUESTION_20>

Q21: Do you agree that the concept of independence should be understood as requiring that independent directors should not be member of the management body or the body in charge of the supervisory function nor employees of any of the undertakings within the group?

<ESMA_UCITS_QUESTION_21>
No we do not agree. As noted in our response to Q 13 this proposal is inconsistent with level-1 regulation. The concept of independence should not cover members of the management body nor employees of undertakings of the group, provided these undertakings are neither the depositary nor the asset management company.
<ESMA_UCITS_QUESTION_21>

Q22: Do you have knowledge of the impact that each of the two options identified would have in terms of restructuring the shareholding of any Relevant Entities or finding alternative service providers? If yes, please provide data and an estimation of the one-off and ongoing costs that would be incurred.

<ESMA_UCITS_QUESTION_22>
The prohibition of cross shareholding, as envisaged in option 1 ("the management company company/investment company shall not be included in the same group…") may, if retained by ESMA, have significantly detrimental consequences for the investors:

- European-based diversified financial groups with a depositary arm will be compelled to limit their operations in asset management, thus depriving the market of a substantial part of the range of products available for investment for the retail market. This in turn will cause unpredictable disturbance in the (well functioning) European market and non-European competitions could benefit from.
- European-based diversified financial groups with an asset management arm will exit the depositary sector. Depositary service offering in the UE will therefore be reduced, limited to fewer players, and is likely to be offered by banks somewhat away from the asset industry limitations.
- Option 1 would entail huge costs and a complete transformation of the existing models with a possibility to weaken and put at risk the overall sector. These costs would ultimately be borne by UCITS investors with no added- value in terms of protection, bearing in mind the absence of evidenced market failure.

Indicatively, in terms of asset under management (AuM) the percentage of AuM that would need to be transferred to another depositary can be roughly estimated at 62% in France, 65% in Spain, at 40% in Germany and 25% in Finland.

These costs would be far beyond the abovementioned costs of transfer: Option 1 would, in our view, contradict - without any compelling grounds- to the freedom of enterprise in the European financial market and lead to a far reaching market restructuration detrimental to:
1. The stability and safety of the whole UCITS model
2. The stability of the banking sector
3. The financing of the economy
4. The employment in the financing sector
<ESMA_UCITS_QUESTION_22>

Annex III

Cost-benefit analysis

Q23: Do you agree with ESMA's approach to discard the second and third options described above?

<ESMA_UCITS_QUESTION_23>
Please refer to our response to Q 13. We agree with ESMA's approach to discard the second and third option.
<ESMA_UCITS_QUESTION_23>