

AMF position 2013-06 ETFs and other UCITS issues

Background regulations: Articles L. 214-23, R. 214-15 to R. 214-19 and D. 214-22-1 of the Monetary and Financial Code

The Autorité des Marchés Financiers (AMF) applies all the Guidelines issued by ESMA¹ on ETFs and other UCITS issues (ESMA/2012/832). These guidelines have been enacted on the basis of Directive UCITS IV (2009/65/EC) transposed into domestic law in the Monetary and Financial Code and in the AMF General Regulation.

They set out ESMA's vision on how EU law should apply when it comes to managing UCITS by specifying on the one hand the information on index funds and ETFs that must be published and, on the other hand, the specific rules that must be complied with by UCITS when they use over-the-counter financial derivative instruments and efficient portfolio management techniques. These Guidelines also set out criteria that must be complied with by index funds in which UCITS invest.

Scope

These Guidelines apply to UCITS compliant with Directive 2009/65/EC (UCITS).

They revolved around six issues:

- Index-tracking leveraged or unleveraged UCITS,
- ETFs and the treatment of secondary market investors,
- The use of efficient portfolio management techniques,
- The use of financial derivative instruments,
- Counterparty risk and the management of collateral,
- Eligible financial indices.

ETFs are governed by Article D. 214-22-1 of the Monetary and Financial Code.

Incorporation into the regulatory practices of the AMF

The AMF informs financial market participants covered by these rules that, from now on, their personal obligations arising from the legal and regulatory provisions stemming from the transposition of the aforementioned Directive must be understood in light of the provisions set out in this position, which itself reiterates the ESMA Guidelines 2012/832.

This position shall apply from the date of its publication. However, the provisions of Article 28 shall only apply from the date of entry into force of the decree amending Article R. 214-15-1 of the Monetary and Financial Code. In the meantime, the AMF recommends at this juncture that asset management companies comply with the provisions of Article 28, it being stipulated that its scope could be specified by ESMA.

Transitional provisions are set out in paragraphs 54 et seq.

¹ ESMA = European Securities and Market Authority

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Definitions

Actively-managed UCITS ETF

An actively-managed UCITS ETF is a UCITS ETF, the manager of which has discretion over the composition of its portfolio, subject to the stated investment objectives and policies (as opposed to a UCITS ETF which tracks an index and does not have such discretion). An actively-managed UCITS ETF generally tries to outperform an index.

Annual Tracking Difference

The difference between the annual return of the Index-tracking UCITS and the annual return of the tracked index.

UCITS ETF

A UCITS ETF is a UCITS at least one unit or share class of which is traded throughout the day on at least one regulated market or Multilateral Trading Facility with at least one market maker which takes action to ensure that the stock exchange value of its units or shares does not significantly vary from its net asset value and where applicable its Indicative Net Asset Value.

Indicative Net Asset Value

A measure of the intraday value of the net asset value of a UCITS ETF based on the most up-to-date information. The Indicative Net Asset Value is not the value at which investors on the secondary market purchase and sell their units or shares.

Index-tracking UCITS

A UCITS the strategy of which is to replicate or track the performances of an index or indices e.g. through synthetic or physical replication.

Index-tracking leveraged UCITS

A UCITS the strategy of which is to have a leveraged exposure to an index or exposure to a leveraged index.

Multilateral Trading Facility

A multilateral trading facility as defined in Article 14 of Directive 2004/39/EC of the European Parliament and of the Council on markets in financial instruments.

Tracking error

The volatility of the difference between the return of the Index-tracking UCITS and the return of the index or indices tracked.

I. Index-tracking UCITS

1. The prospectus of an index-tracking UCITS should include:

a) a clear description of the indices including information on their underlying components. In order to avoid the need to update the document frequently, the prospectus can direct investors to a web site where the exact compositions of the indices are published;

b) information on how the index will be tracked (for example whether it will follow a full or sample based physical replication model or a synthetic replication) and the implications of the chosen method for investors in terms of their exposure to the underlying index and counterparty risk;

c) information on the anticipated level of tracking error in normal market conditions;

d) a description of factors that are likely to affect the ability of index-tracking UCITS to track the performances of the indices, such as transaction costs, small illiquid components, dividend reinvestment etc.

2. Information to be provided under paragraph 1b) above should also be included in a summary form in the key investor information document.

3. The annual and half-yearly reports of an index-tracking UCITS should state the size of the tracking error at the end of the period under review. The annual report should provide an explanation of any divergence between the anticipated and realised tracking error for the relevant period. The annual report should also disclose and explain the annual tracking difference between the performance of the UCITS and the performance of the index tracked.

II. Index-tracking leveraged UCITS

4. Index-tracking leveraged UCITS must comply with the limits and rules on global exposure established by Article 51(3) of the UCITS Directive. They should calculate their global exposure using either the commitment approach or the relative Value at Risk approach according to the rules set out in the Guidelines on Risk Measurement and the Calculation of Global Exposure and Counterparty Risk for UCITS. The global exposure limitation also applies to UCITS replicating leveraged indices.

5. The prospectus for index-tracking leveraged UCITS should include the following information:

a) a description of the leverage policy, how this is achieved (i.e. whether the leverage is at the level of the index or arises from the way in which the UCITS obtains exposure to the index), the cost of the leverage (where relevant) and the risks associated with this policy;

b) a description of the impact of any reverse leverage (i.e. short exposure);

c) a description of how the performance of the UCITS may differ significantly from the multiple of the index performance over the medium to long term.

6. This information should also be included in a summary form in the key investor information document.

III. UCITS ETFs – Identifier and specific disclosure

7. A UCITS ETF should use the identifier 'UCITS ETF' which identifies it as an exchange-traded fund. This identifier should be used in its name, fund rules or instrument of incorporation, prospectus, key investor information document and marketing communications. The identifier 'UCITS ETF' should be used in all EU languages.

8. A UCITS which is not a UCITS ETF (as defined in these guidelines) should use neither the 'UCITS ETF' identifier nor 'ETF' nor 'exchange-traded fund'.

9. A UCITS ETF should disclose clearly in its prospectus, key investor information document and marketing communications the policy regarding portfolio transparency and where information on the portfolio may be obtained, including where the indicative net asset value, if applicable, is published.

10. A UCITS ETF should also disclose clearly in its prospectus how the indicative net asset value is calculated, if applicable, and the frequency of calculation.

IV. Actively-managed UCITS ETFs

11. An actively-managed UCITS ETF should inform investors clearly in its prospectus, key investor information document and marketing communications of that fact.

12. An actively-managed UCITS ETF should disclose clearly in its prospectus, key investor information document and marketing communications how it will meet the stated investment policy including, where applicable, its intention to outperform an index.

V. Treatment of secondary market investors of UCITS ETFs

13. Where units of a UCITS ETF purchased on a secondary market are generally not redeemable from the fund, the prospectus and marketing communications of the fund should include the following warning:

14. 'UCITS ETF's units / shares purchased on the secondary market cannot usually be sold directly back to UCITS ETF. Investors must buy and sell units / shares on a secondary market with the assistance of an intermediary (e.g. a stockbroker) and may incur fees for doing so. In addition, investors may pay more than the current net asset value when buying units / shares and may receive less than the current net asset value when selling them.'

15. If the stock exchange value of the units or shares of the UCITS ETF significantly varies from its net asset value, investors who have acquired their units or shares (or, where applicable, any right to acquire a unit or share that was granted by way of distributing a respective unit or share) on the secondary market should be allowed to sell them directly back to the UCITS ETF. For example, this may apply in cases of market disruption such as the absence of a market maker. In such situations, information should be communicated to the regulated market indicating that the UCITS ETF is open for direct redemptions at the level of the UCITS ETF.

16. A UCITS ETF should disclose in its prospectus the process to be followed by investors who purchased their units/shares on the secondary market should the circumstances described in paragraph 15 arise, as well as the potential costs involved. The costs should not be excessive.

VI. Efficient portfolio management techniques

17. A UCITS should inform investors clearly in the prospectus of its intention to use the techniques and instruments referred to in Article 51(2) of the UCITS Directive and Article 11 of the Eligible Assets Directive. This should include a detailed description of the risks involved in these activities, including counterparty risk and potential conflicts of interest, and the impact they will have on the performance of the UCITS. The use of these techniques and instruments should be in line with the best interests of the UCITS.

18. In accordance with Article 11 of the Eligible Assets Directive, UCITS employing efficient portfolio management techniques should make sure that the risks arising from these activities are adequately captured by the risk management process of the UCITS.

19. In accordance with paragraph 24 of the Guidelines on Eligible Assets for Investment by UCITS, techniques and instruments relating to transferable securities and money market instruments should not:

- a) result in a change of the declared investment objective of the UCITS; or
- b) add substantial supplementary risks in comparison to the original risk policy as described in its sales documents.

20. The UCITS should disclose in the prospectus the policy regarding direct and indirect operational costs/fees arising from efficient portfolio management techniques that may be deducted from the revenue delivered to the UCITS. These costs and fees should not include hidden revenue. The UCITS should disclose the identity of the entity(ies) to which the direct and indirect costs and fees are paid and indicate if these are related parties to the UCITS management company or the depository.

21. All the revenues arising from efficient portfolio management techniques, net of direct and indirect operational costs, should be returned to the UCITS.

22. A UCITS should ensure that it is able at any time to recall any security that has been lent out or terminate any securities lending agreement into which it has entered.

23. A UCITS that enters into a reverse repurchase agreement should ensure that it is able at any time to recall the full amount of cash or to terminate the reverse repurchase agreement on either an accrued basis or a mark-to-market basis. When the cash is callable at any time on a mark-to-market basis, the mark-to-market value of the reverse repurchase agreement should be used for the calculation of the net asset value of the UCITS.

24. A UCITS that enters into a repurchase agreement should ensure that it is able at any time to recall any securities subject to the repurchase agreement or to terminate the repurchase agreement into which it has entered.

25. Fixed-term repurchase and reverse repurchase agreements that do not exceed seven days should be considered as arrangements on terms that allow the assets to be recalled at any time by the UCITS.

26. UCITS entering into efficient portfolio management transactions should take into account these operations when developing their liquidity risk management process in order to ensure they are able to comply at any time with their redemption obligations.

27. The UCITS' annual report should also contain details of the following:

- a) the exposure obtained through efficient portfolio management techniques;
- b) the identity of the counterparty(ies) to these efficient portfolio management techniques;
- c) the type and amount of collateral received by the UCITS to reduce counterparty exposure; and
- d) the revenues arising from efficient portfolio management techniques for the entire reporting period together with the direct and indirect operational costs and fees incurred.

VII. Financial derivative instruments

28. Where a UCITS enters into a total return swap or invests in other financial derivative instruments with similar characteristics, the assets held by the UCITS should comply with the investment limits set out in Articles 52, 53, 54, 55 and 56 of the UCITS Directive. For example, when a UCITS enters into an unfunded swap, the UCITS' investment portfolio that is swapped out should comply with the aforementioned investment limits.

29. In accordance with Article 51(3) of the UCITS Directive and Article 43(5) of Directive 2010/43/EU, where a UCITS enters into a total return swap or invests in other financial derivative instruments with similar characteristics, the underlying exposures of the financial derivative instruments shall be taken into account to calculate the investment limits laid down in Article 52 of the UCITS Directive.

30. The prospectus of a UCITS using total return swaps or other financial derivative instruments with the same characteristics should include the following:

- a) information on the underlying strategy and composition of the investment portfolio or index;
- b) information on the counterparty(ies) of the transactions;
- c) a description of the risk of counterparty default and the effect on investor returns;
- d) the extent to which the counterparty assumes any discretion over the composition or management of the UCITS' investment portfolio or over the underlying of the financial derivative instruments, and whether the approval of the counterparty is required in relation to any UCITS investment portfolio transaction; and
- e) subject to the provisions in paragraph 31, identification of the counterparty as an investment manager.

31. Where the counterparty has discretion over the composition or management of the UCITS' investment portfolio or of the underlying of the financial derivative instrument, the agreement between the UCITS and the counterparty should be considered as an investment management delegation arrangement and should comply with the UCITS requirements on delegation.

32. The UCITS' annual report should contain details of the following:

- a) the underlying exposure obtained through financial derivative instruments;
- b) the identity of the counterparty(ies) to these financial derivative transactions; and
- c) the type and amount of collateral received by the UCITS to reduce counterparty exposure.

VIII. Management of collateral for OTC financial derivative transactions and efficient portfolio management techniques ²

33. The risk exposures to a counterparty arising from OTC financial derivative transactions and efficient portfolio management techniques should be combined when calculating the counterparty risk limits of Article 52 of UCITS Directive ³.

34. . All assets received by UCITS in the context of efficient portfolio management techniques should be considered as collateral for the purpose of these guidelines and should comply with the criteria laid down in paragraph 35 below.

² These guidelines on collateral management modify Box 26 of the existing guidelines on Risk Measurement and Calculation of Global Exposure and Counterparty Risk for UCITS (Ref. CESR/10-788) with respect to criteria to be respected by collateral received in the context of OTC financial derivative transactions.

³ This provision modifies Box 27 of the existing guidelines on Risk Measurement and Calculation of Global Exposure and Counterparty Risk for UCITS with respect to the limit of counterparty risk arising from efficient portfolio management transactions.

35. Where a UCITS enters into OTC financial derivative transactions and efficient portfolio management techniques, all collateral used to reduce counterparty risk exposure should comply with the following criteria at all times.

- a) Liquidity – any collateral received other than cash should be highly liquid and traded on a regulated market or multilateral trading facility with transparent pricing in order that it can be sold quickly at a price that is close to pre-sale valuation. Collateral received should also comply with the provisions of Article 56 of the UCITS Directive.
- b) Valuation – collateral received should be valued on at least a daily basis and assets that exhibit high price volatility should not be accepted as collateral unless suitably conservative haircuts are in place.
- c) Issuer credit quality – collateral received should be of high quality.
- d) Correlation – the collateral received by the UCITS should be issued by an entity that is independent from the counterparty and is expected not to display a high correlation with the performance of the counterparty.
- e) Collateral diversification (asset concentration) – collateral should be sufficiently diversified in terms of country, markets and issuers. The criterion of sufficient diversification with respect to issuer concentration is considered to be respected if the UCITS receives from a counterparty of efficient portfolio management and over-the-counter financial derivative transactions a basket of collateral with a maximum exposure to a given issuer of 20% of its net asset value. When UCITS are exposed to different counterparties, the different baskets of collateral should be aggregated to calculate the 20% limit of exposure to a single issuer.
- f) Risks linked to the management of collateral, such as operational and legal risks, should be identified, managed and mitigated by the risk management process.
- g) Where there is a title transfer, the collateral received should be held by the depositary of the UCITS. For other types of collateral arrangement, the collateral can be held by a third party custodian which is subject to prudential supervision, and which is unrelated to the provider of the collateral.
- h) Collateral received should be capable of being fully enforced by the UCITS at any time without reference to or approval from the counterparty.
- i) Non-cash collateral received should not be sold, re-invested or pledged⁴.
- j) Cash collateral received should only be:
 - placed on deposit with entities prescribed in Article 50(f) of the UCITS Directive;
 - invested in high-quality government bonds;
 - used for the purpose of reverse repo transactions provided the transactions are with credit institutions subject to prudential supervision and the UCITS is able to recall at any time the full amount of cash on accrued basis;
 - invested in short-term money market funds as defined in the Guidelines on a Common Definition of European Money Market Funds.

36. Re-invested cash collateral should be diversified in accordance with the diversification requirements applicable to non-cash collateral.

⁴ These guidelines on collateral management modify Box 9 of the existing guidelines on Risk Measurement and Calculation of Global Exposure and Counterparty Risk for UCITS (Ref. CESR/10-788) with respect to the prohibition of reinvestment of non-cash collateral received in the context of efficient portfolio management transactions.

37. A UCITS receiving collateral for at least 30% of its assets should have an appropriate stress testing policy in place to ensure regular stress tests are carried out under normal and exceptional liquidity. A UCITS receiving collateral for at least 30% of its assets should have an appropriate stress testing policy in place to ensure regular stress tests are carried out under normal and exceptional liquidity:

- a) design of stress test scenario analysis including calibration, certification & sensitivity analysis;
- b) empirical approach to impact assessment, including back-testing of liquidity risk estimates;
- c) reporting frequency and limit/loss tolerance threshold/s; and
- d) mitigation actions to reduce loss including haircut policy and gap risk protection.

38. A UCITS should have in place a clear haircut policy adapted for each class of assets received as collateral. When devising the haircut policy, a UCITS should take into account the characteristics of the assets such as the credit standing or the price volatility, as well as the outcome of the stress tests performed in accordance with paragraph 39. This policy should be documented and should justify each decision to apply a specific haircut, or to refrain from applying any haircut, to a certain class of assets.

39. The prospectus should also clearly inform investors of the collateral policy of the UCITS. This should include permitted types of collateral, level of collateral required and haircut policy and, in the case of cash collateral, re-investment policy (including the risks arising from the re-investment policy).

IX. Financial indices

40. When a UCITS intends to make use of the increased diversification limits referred to in Article 45 of the UCITS Directive, this should be disclosed clearly in the prospectus together with a description of the exceptional market conditions which justify this investment.

41. A UCITS should not invest in a financial index which has a single component that has an impact on the overall index return which exceeds the relevant diversification requirements i.e. 20%/35%. In the case of a leveraged index, the impact of one component on the overall return of the index, after having taken into account the leverage, should respect the same limits.

42. A UCITS should not invest in commodity indices that do not consist of different commodities. Subcategories of the same commodity (for instance, from different regions or markets or derived from the same primary products by an industrialised process) should be considered as being the same commodity for the calculation of the diversification limits. For example, WTI Crude Oil, Brent Crude Oil, Gasoline or Heating Oil contracts should be considered as being all sub-categories of the same commodity (i.e. oil). Sub-categories of a commodity should not be considered as being the same commodity if they are not highly correlated. With respect to the correlation factor, two components of a commodity index that are sub-categories of the same commodity should not be considered as highly correlated if 75% of the correlation observations are below 0.8. For that purpose, the correlation observations should be calculated (i) on the basis of equally-weighted daily returns of the corresponding commodity prices and (ii) from a 250-day rolling time window over a 5-year period.⁵

43. A UCITS should be able to demonstrate that an index satisfies the index criteria in Article 53 of the UCITS Directive and Article 9 of the Eligible Assets Directive, including that of being a benchmark for the market to which it refers. For that purpose:

⁵ These guidelines modify the existing guidelines on eligible assets for investment by UCITS (Ref. CESR/07-044b) with respect to commodity indices. UCITS should not invest in commodity indices that do not comply with the requirements laid down in paragraph 40.

- a) an index should have a clear, single objective in order to represent an adequate benchmark for the market;
- b) the universe of the index components and the basis on which these components are selected for the strategy should be clear to investors and competent authorities;
- c) if cash management is included as part of the index strategy, the UCITS should be able to demonstrate that this does not affect the objective nature of the index calculation methodology.

44. An index should not be considered as being an adequate benchmark of a market if it 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.

45. The UCITS' prospectus should disclose the rebalancing frequency and its effects on the costs within the strategy.

46. A UCITS should not invest in a financial index whose rebalancing frequency prevents investors from being able to replicate the financial index. Indices which rebalance on an intra-day or daily basis do not satisfy this criterion. For the purpose of these guidelines, technical adjustments made to financial indices (such as leveraged indices or volatility target indices according to publicly available criteria should not be considered as rebalancing in the context of this paragraph.

47. UCITS should not invest in financial indices for which the full calculation methodology to, inter alia, enable investors to replicate the financial index is not disclosed by the index provider. This includes providing detailed information on index constituents, index calculation (including effect of leverage within the index), re-balancing methodologies, index changes and information on any operational difficulties in providing timely or accurate information. Calculation methodologies should not omit important parameters or elements to be taken into account by investors to replicate the financial index. This information should be easily accessible, free of charge, by investors and prospective investors, for example, via the internet. Information on the performance of the index should be freely available to investors.

48. A UCITS should not invest in financial indices that do not publish their constituents together with their respective weightings. This information should be easily accessible, free of charge, by investors and prospective investors, for example, via the internet. Weightings may be published after each rebalancing on a retrospective basis. This information should cover the previous period since the last rebalancing and include all levels of the index.

49. A UCITS should not invest in financial indices whose methodology for the selection and the rebalancing of the components is not based on a set of pre-determined rules and objective criteria.

50. A UCITS should not invest in financial indices whose index provider accepts payments from potential index components for inclusion in the index.

51. A UCITS should not invest in financial indices whose methodology permits retrospective changes to previously published index values ('backfilling').

52. The UCITS should carry out appropriate documented due diligence on the quality of the index. This due diligence should take into account whether the index methodology contains an adequate explanation of the weightings and classification of the components on the basis of the investment strategy and whether the index represents an adequate benchmark. The due diligence should also cover matters relating to the index components. The UCITS should also assess the availability of information on the index including:

- a) whether there is a clear narrative description of the benchmark;
- b) whether there is an independent audit and the scope of such an audit;

c) the frequency of index publication and whether this will affect the ability of the UCITS to calculate its net asset value.

53. The UCITS should ensure that the financial index is subject to independent valuation.

X. Transitional provisions

54. Any new UCITS created after 18 February 2013 should comply with the guidelines immediately.

55. UCITS that exist before 18 February 2013 and that invest in financial indices that do not comply with the guidelines should align their investments with the guidelines within 12 months of 18 February 2013.

56. Structured UCITS as defined in Article 36 of Regulation 583/2010 that exist before the date of application of the guidelines are not required to comply with the guidelines provided that they do not accept any new subscriptions after 18 February 2013. However, in order to be able to continue offering the underlying payoff to existing investors, such existing UCITS can actively manage their financial contracts.

57. UCITS that exist before 18 February 2013 should align their portfolio of collateral with the guidelines within 12 months of 18 February 2013. However, any reinvestment of cash collateral after 18 février 2013 should comply with the guidelines immediately.

58. UCITS that exist before 18 February 2013 and that have entered into revenue-sharing arrangements should comply with paragraph 20 of the guidelines within 12 months of 18 February 2013.

59. A UCITS ETF which exists before 18 February 2013 is not required to comply with guidelines relating to identifiers until the earlier of:

a) the first occasion after 18 February 2013 on which the name of the fund is changed for another reason; and

b) twelve months after 18 February 2013.

60. UCITS ETFs that exist before 18 February 2013 should comply with the provisions related to the treatment of secondary market investors from the application date.

61. Requirements relating to the contents of the fund rules or instrument of incorporation of an existing UCITS, its prospectus, its key investor information document, or any marketing communication that it has issued prior to 18 February 2013, do not come into effect until the earlier of:

a) the first occasion after 18 February 2013, on which the document or communication, having been revised or replaced for another purpose, is published; and

b) twelve months after 18 February 2013.

62. Requirements to publish information in the report and accounts of an existing UCITS do not apply in respect of any accounting period that has ended before 18 February 2013.