

Cross-Border Distribution of Collective Investment Schemes

Agreement on the Compromise Texts of the Proposed Directive and Regulation

Introduction

On 12 March, 2018 the European Commission presented its original proposals for a Directive and accompanying Regulation on the cross-border distribution of collective investment schemes with the objective of addressing regulatory barriers which it had identified as a significant disincentive to EU cross-border distribution.

Following a period of negotiation and technical finalisation between the European Commission, the European Parliament and the Council of the EU, the Council on 22 February, 2019 published an "I" item note setting out the final compromise texts of the:

- » Proposed Directive amending the UCITS Directive and AIFMD with regard to the cross-border distribution of collective investment funds (the "Directive"); and
- » Proposed Regulation on facilitating cross-border distribution of collective investment funds (the "Regulation").

The Directive and Regulation aim to 'coordinate the conditions for fund managers operating in the internal market and facilitate cross-border distribution of the funds they manage' by filling in the regulatory gaps, aligning the notification procedure to the competent authorities, authorising ESMA to develop new technical standards, improving the transparency of national requirements and ensuring national authorities can control AIFM's pre-marketing arrangements, while all the while safeguarding investor protection.

Timeframe

The European Commission's intention is that these texts will be adopted before the European Parliament elections in May 2019. As such the Parliament plans to consider the proposals before the end of the current legislative term on 18 April, 2019. Each legislative act will enter into force on the twentieth day following its publication in the official Journal of the European Union. Member states will have twenty-four months from the date of entry into force of the Directive to transpose the provisions thereof into national law. Progress on drafting of Irish implementing measures are understood to be at an advanced stage. The Regulation will apply from the date of entry into force except for certain provisions which will apply twenty-four months after the date of entry into force, i.e.

- » paragraph 1 and 4 of Article 2 relating to marketing communications;
- » paragraph 1 and 2 of Article 3 relating to the publication of national provisions concerning marketing requirements;
- » Article 12 relating to amendments to Regulation (EU) No 345/2013 on European venture capital funds; and
- » Article 13 relating to amendments to Regulation (EU) No 346/2013 on European social entrepreneurial funds.

The Directive – key changes

The proposed Directive contains amendments to the UCITS Directive and the AIFMD relating to, *inter alia*, creating a more harmonised approach marketing facilities, notification of information to member states, the discontinuation of marketing and pre-marketing of AIFs.

Harmonised rules relating to marketing content, facilities and notification of updated information

- » UCITS provisions on content requirements for UCITS marketing communications (Article 77) and the publication of national rules on marketing (Article 91(3)) are replaced with provisions in the proposed Regulation (which will allow less scope for differences in implementation).
- » The provisions of the UCITS Directive which require UCITS to provide facilities as implemented by certain national member states have proven to be burdensome. Consequently, Article 92 regarding the provision of local facilities will be replaced so that the facilities requirements are harmonised and that they may be provided electronically or by means of other distance communications with investors. Accordingly, Member States may no longer require the UCITS Management Company (“ManCo”) to provide the facilities by means of a physical presence or requiring the appointment of a third party to process dealing orders and payments. Similar provisions are introduced for AIFMs marketing AIFs to retail investors.
- » In the event of a change to information notified to a member state or a change regarding share classes to be marketed, the proposed Directive provides that written notice must be given to the national competent authority of the home member state of the UCITS and the competent authority of the host member state at least one month before implementing that change. If it is of the view that as a result of the change the UCITS would no longer comply with the UCITS Directive the home state competent authority must then notify the UCITS within 15 working days that it is not to implement the change. Otherwise the national competent authority of the home member state must inform the host regulator without delay. Importantly where a change is implemented subsequent to a notification by the competent authority of the home member state that the UCITS is not to implement that change and pursuant to that change the UCITS no longer complies with the UCITS Directive, the competent authorities of the home Member State of the UCITS are required to take all due measures including, where necessary, the express prohibition of marketing of the UCITS and shall notify accordingly the competent authorities of the host Member State without undue delay. Similar changes are made to the AIFMD in respect of the approval or rejection of planned changes.

Discontinuation of Marketing

The proposed Directive provides for a more harmonised approach to the discontinuation of marketing in order to create more economic and legal certainty for managers in a host member state, in particular requiring that the UCITS fulfil all of the following conditions:

- a. make a blanket public offer to repurchase, free of charges and deductions, all shares or units held by investors in that Member State, which offer must remain open for at least 30 working days and
- b. publicise its intention to stop marketing in that Member State, by a medium customary for marketing a UCITS (which may include electronic means); and
- c. modify or terminate any contractual arrangements with financial intermediaries or delegates to prevent any further marketing.

The information referred to in points (b) and (c) must make clear the consequences for investors if they do not accept the offer to redeem or repurchase their units.

- » The ManCo will notify its home competent authority who, no later than 15 days, from the date of receipt will transmit the request to the host competent authority and to ESMA and inform the ManCo. The UCITS may not be marketed thereafter although the obligations to provide information to investors who remain will continue.
- » Similar provisions are introduced for AIFMs discontinuing marketing of AIFs, other than closed-ended AIFs and European long-term investment funds.

Pre-Marketing (AIFs)

- » A new harmonised regime for pre-marketing of AIFs in the EU will be introduced. While currently some member states permit pre-marketing by an AIFM the conditions attaching to such pre-marketing vary considerably in those member states. The proposed Directive will provide for an authorised EU AIFM to engage in pre-marketing in the EU.

“Pre-marketing’ is defined as the “ provision of information or communication, direct or indirect, on investment strategies or investment ideas by an EU AIFM or on its behalf, to potential professional investors domiciled or registered in the Union in order to test their interest in an AIF which is not yet established, or in an AIF which is established, but not yet notified for marketing in accordance with Article 31 or 32, or in compartments of such AIFs, in that Member State where the potential investors are domiciled or have their registered office, and which in each case does not amount to an offer or placement to the investor to invest in the units or shares of that AIF or compartment.”



Publication of the final compromise texts of the proposed Directive and Regulation on the cross-border distribution of collective investment schemes

An authorised EU AIFM engaging in pre-marketing may not present information to investors relating to or containing reference to an established AIF, enabling investors to commit to acquiring units or shares of a particular AIF; or amounting to a constitutional document, a prospectus, a subscription forms or similar document whether in a draft or a final form allowing investors to take an investment decision. Any pre-marketing document shall clearly state that the document does not constitute an offer or an invitation to subscribe to units or shares of an AIF; and the information presented in those documents should not be relied upon because it is incomplete and may be subject to change. AIFMs which engage in pre-marketing must notify their home competent authority.

The Regulation – key changes

The proposed Regulation will also amend the EuVECA Regulation (Regulation 345/2013) and the EuSEF Regulation (Regulation 346/2013) to provide for a pre-marketing regime similar to that set out for AIFMs in the draft Directive amending the UCITS Directive and AIFMD with regard to cross-border distribution of funds.

The proposed Regulation sets out harmonised requirements for a transparent marketing framework and provides for administrative matters, including a greater role in centralised information gathering and decision-making by ESMA:

- » National regulators will be permitted to charge fees which must be proportionate to the regulatory tasks carried out and subject to a transparent process.
- » Where national law requires that marketing materials be submitted to the national regulator for review, the national regulator must itself comply with provisions which aim to improve transparency and promote non-discriminatory treatment, regardless of the member state in which the fund is authorised.
- » UCITS and AIFs will be required to comply with harmonised requirements for their marketing materials with ESMA required to issue implementing technical standards to the Commission within eighteen months of the entry into force of the Regulation. ESMA is also tasked with drafting a range of standard templates, forms and procedures governing the transmission of the required information. National regulators will be required to transmit notifications, notification letters, written notices and information relating to notifications to ESMA.
- » The proposed Regulation obliges ESMA to publish and maintain on its website a central database, publicly accessible in at least a language customary in the sphere of international finance, listing all AIFMs, ManCos, AIFs and UCITS which those AIFMs and ManCos are managing and marketing as well as the member states in which those funds are marketed.

Comment

It is expected that the changes contained in the proposed Directive and Regulation will bring welcome clarity to the AIF pre-marketing concept, where conditions currently vary significantly between member states where pre-marketing is permitted. Certain of the other harmonising proposals have been met with mixed reviews from market participants given the disparities between the fund products involved (some of these concerns were echoed by the European Parliament) and it remains to be seen the extent to which the proposals will contribute to the stated objective of increasing the cross-border distribution of funds while improving ease and transparency, particularly against the backdrop of considerable developments, chief amongst them the impact of Brexit, in the regulatory regimes governing EU cross-border distribution channels.

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