



Capital Markets Union: European Commission proposal on facilitating the cross-border distribution of investment funds. June 2018.

As part of the Capital Markets Union Action Plan, on 12 March 2018 the European Commission (EC) launched a package of measures which included a proposal for a Regulation and a proposal for a Directive aimed at facilitating the cross-border distribution of collective investment funds and reducing the cost of this activity, while at the same time ensuring a high level of investor protection.

The Regulation will also amend the Regulation on European Venture Capital Funds (EuVECA)¹ and the Regulation on European Social Entrepreneurship Funds (EuSEF)². Similarly, the Directive will amend the UCITS Directive (on Undertakings for Collective Investment in Transferable Securities)³ and the Alternative Investment Fund Managers (AIFM) Directive⁴.

The rules on collective investment funds in the European Union (EU) permit the distribution and, with some exceptions, the cross-border management of funds. Although the volume of assets managed in the EU has grown rapidly, investment fund markets are still largely organised on a national basis (around 70% of managed assets). In addition, in comparison with the US industry, European funds are small. This has a negative impact on economies of scale and on the fees paid by investors, as well as on the functioning of the domestic investment funds market.

Although the EC recognises that some of the factors acting as a barrier to the cross-border distribution of the funds, such as domestic tax regimes applicable to investment funds and their investors, vertical distribution channels, and cultural preferences, fall outside its field of competence, the current proposal seeks to address the regulatory barriers detected during the previous consultations and studies.

Specifically, the barriers that the EC detected in this area which are preventing the full potential of the single market from being realised are the following: i) the existence of a legal framework which is not sufficiently transparent in terms of legal requirements and administrative practices (sometimes costly and unnecessarily complex) ii) different national approaches to requirements and verifications of the marketing communications; and iii) variations in the fees and charges levied by the national competent authorities (NCAs) for supervisory tasks in accordance with the directives.

For this reason the EC is launching this initiative with the aim of harmonising Member States' marketing requirements, regulatory fees, and notification and administrative requirements.

¹ Regulation (EU) no. 345/2013 of the European Parliament and of the Council of 17 April 2013 on European Venture Capital Funds.

² Regulation (EU) no. 346/2013 of the European Parliament and of the Council of 17 April 2013 on European

Social Entrepreneurship Funds.

³ Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS).

⁴ Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) no. 1060/2009 and (EU) no. 1095/2010.

Prior work undertaken by the European Commission

The work started with two consultations in 2015, the Green Paper on the Capital Markets Union and the Call for Evidence on the EU regulatory framework for financial services. Responses to both seemed to indicate that the regulatory barriers to the cross-border distribution of investment funds were preventing the full benefits of the single market from being realised.

The EC requested further information from the European Securities and Markets Authority (ESMA) and the NCAs on current national practices in areas such as regulatory fees and marketing requirements.

With all the information received, in 2016 the EC launched a public consultation on the main barriers to the cross-border distribution of investment funds, seeking practical examples of existing problems and data regarding their impact. Most of the 64 responses received suggested that regulatory barriers were a significant disincentive to cross-border distribution.

Based on the information received, and at the request of the EC, ESMA conducted a follow-up survey in 2017. That same year, the EC set up meetings with the investment fund sector and European investor associations and sent a questionnaire to eight professional organisations, with a particular focus on quantifying the costs caused by regulatory barriers. According to the information received, they amount to 1 to 4% of the overall expenses of a fund.

Finally, an impact assessment report was produced which recommended changes aimed at bringing about:

- a) Greater transparency in national marketing requirements both at a national and EU level, the harmonisation of the AIFM Directive's definition of pre-marketing, and the clearer framing of the national marketing material verification process.
- b) Greater transparency in regulatory fees at an EU level and the introduction of principles to ensure consistency in the manner in which fees are established.
- c) That the choice of facilities to support local investors should be left to managers of investment funds, with safeguards for investors.
- d) Greater harmonisation in the procedures and requirements for updating notifications and de-notifications of the use of the marketing passport.

The first two points are addressed by the proposal for a Regulation, while the latter two are addressed by the proposal for a Directive.

Specific provisions of the proposal

1. The Directive

There are currently divergences in the national application of the provisions. Changes are proposed to provide clarity, greater harmonisation, and to correct the impacts of the barriers detected. To this end, existing

measures are adapted and new ones proposed. The Directive will be reviewed 3 years after its entry into force.

The proposals to change the UCITS Directive include:

- The deletion of articles relating to marketing communications requirements, since the legal provisions governing this matter are included in the proposal for a Regulation.
- The requirement that UCITS managers should provide local facilities to clients of host Member States where UCITS are marketed; for example, services such as making subscriptions and payments or repurchasing and redeeming units may be provided by electronic means or remotely instead of requiring managers' physical presence, which is costly and provides no added value.
- The harmonisation of national procedures applicable to the introduction of changes in the notification procedure. In particular, the aim is to establish a precise time frame for communicating decisions of the NCAs.
- The introduction of de-notification requirements for UCITS managers who decide to discontinue their marketing activities in a Member State; for example, de-notification is permitted only if a maximum of ten investors, who hold up to 1% of the assets under management of the UCITS have invested in the UCITS in that Member State.

The proposals to change the AIFM Directive include:

- The definition of pre-marketing and the conditions under which an AIFM in the EU can carry out those activities. AIFMs are authorised to test an investment idea or strategy with professional investors, but they may not promote an established fund without providing notification in accordance with the AIFM Directive. When professional investors subscribe units of the fund, or a similar one managed by the AIFM, after its pre-marketing activities this subscription will be considered to be the result of marketing.
- The introduction of de-notification requirements in order to stop marketing an alternative fund (AIF) in a Member State similar to those included in the UCITS Directive for managers of UCITS.
- In line with the requirement in the UCITS Directive, the requirement to use electronic means or other remote means of communication for providing retail investors with services to deal with situations such as making subscriptions and payments or repurchasing and redeeming units, when an AIFM markets AIFs to retail investors.

2. The Regulation

The aim of this proposal is to establish a regulatory framework which will reduce regulatory barriers and harmonise the rules governing collective investment funds; in particular those affecting marketing communications to potential investors and the transparency of provisions not included in the areas regulated by the UCITS and AIFM Directives. It also establishes additional tasks for ESMA in relation to the development and maintenance of databases on national rules in matters of marketing communication, applicable fees and charges, and the storage of notifications. In addition, the initiative modifies the EVCF and ESEF Regulations to include the concept of pre-marketing and related conditions. Finally, ESMA is tasked with establishing technical standards to determine the templates, forms, models and procedures to be used for notification. The Regulation will be reviewed 5 years after its entry into force. Specifically, the proposal includes:

- The principles to be followed by marketing communications: i) they should be identifiable as such; ii) they should present the risks and benefits of the acquisition of AIFs and UCITS so that equal weight is given to each; and iii) all information included should be unbiased, clear, and not misleading.
- The transparency framework for national provisions regarding marketing requirements (publication by NCAs on their websites of all local legal, regulatory and administrative provisions governing the marketing rules for

AIFs and UCITS, together with a summary, in at least one language commonly used in the sphere of international finance, and notification to ESMA, which will publish and maintain a specific central database on its website).

- Requirements for ensuring a transparent and non-discriminatory treatment by the NCAs of verifications of communications for marketing UCITS and AIFs to retail investors, regardless of the funds' country of origin. (Notification may not be a precondition for marketing; NCAs will inform UCITS managers – within ten days of notification – as to whether it is necessary to change their marketing communications, and every year the NCAs will report to ESMA on the decisions to reject marketing communications or ask for them to be altered).
- Requirements for fees or charges received by the NCAs (which should be proportionate to the supervisory tasks carried out, and should be published and maintained on the NCAs' central databases for fees and charges, and available in at least one language commonly used in the sphere of international finance).
- Additional tasks for ESMA. ESMA should publish and maintain on its website a central interactive database with the fees or charges received by the NCAs, which should also allow users to make online calculations. ESMA should also publish and maintain on its website a central database on all AIFMs, UCITS managers, AIFs, and UCITS.
- The introduction of the concept of pre-marketing in the EuVECA and the EuSEF Regulations, ensuring equal terms with authorised managers, in accordance with the AIFM Directive, which will also incorporate this concept.

Links of interest:

[Proposal for a Regulation of the European Parliament and of the Council on facilitating cross-border distribution of collective investment funds and amending Regulations \(EU\) No. 345/2013 and \(EU\) No. 346/2013](#)

[Proposal for a Directive of the European Parliament and of the Council amending Directive 2009/65/EC of the European Parliament and of the Council and Directive 2011/61/EU of the European Parliament and of the Council with regard to cross-border distribution of collective investment funds](#)