
NEW REGULATION ON CROSS-BORDER DISTRIBUTION OF UCITS AND AIFS

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In June 2019, the European Parliament and the Council adopted a number of new rules aimed at facilitating cross-border distribution of investment funds by removing regulatory barriers. The new rules introduce a more harmonised regulatory framework which facilitates cross-border distribution of UCITS and AIFs and provides a higher degree of investor protection regardless of the type of investor. This newsletter focusses on the most material amendments introduced.

AMENDMENTS TO THE UCITS DIRECTIVE AND AIFMD

Directive (EU) 2019/1160 of 20 June 2019 amending Directives 2009/65/EC and 2011/61/EU with regard to cross-border distribution of collective investment undertakings (the "Directive"), which entered into force on 1 August 2019, amends both the UCITS Directive and the AIFMD. Member States must transpose the Directive into national laws by 2 August 2021, on which date the national provisions shall enter into force.

Among other things, the Directive entails the following amendments:

1. Introduction of definition of pre-marketing

To clarify an alternative investment fund manager's (an "AIFM") right to test market interest before establishing or registering an alternative investment fund (an "AIF") pursuant to the AIFMD, the Directive introduces a definition of "pre-marketing" and introduces new rules as to when and how an EU AIFM can engage in pre-marketing activities to professional investors.

Pre-marketing is defined as follows: *"Pre-marketing' means 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 with a registered office in the Union in order to test their interest in an AIF or a compartment which is not yet established, or which is established, but not yet notified for marketing in accordance with Article 31 or 32, 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 potential investor to invest in the units or shares of that AIF or compartment"*.

An EU AIFM may engage in pre-marketing by presenting information to potential investors, provided that such information:

- a) is not sufficient to allow investors to commit to acquiring units or shares of a particular AIF;
- b) does not amount to subscription forms or similar documents, whether in a draft or a final form; or
- c) does not amount to constitutional documents, a prospectus or offering

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documents of a not yet established AIF in final form. If a draft prospectus or offering document is provided, it must not contain information sufficient to allow investors to take an investment decision and shall clearly state that:

- a. they do not constitute an offer or an invitation to subscribe to units or shares of an AIF; and
- b. the information presented therein should not be relied upon because it is incomplete and may be subject to change.

Within 2 weeks of having commenced pre-marketing, an EU AIFM shall send an informal letter to the competent authorities of its home Member State informing them of certain information regarding the pre-marketing, as specified in the Directive.

Furthermore, the EU AIFM shall ensure that any pre-marketing is adequately documented. The Directive does not provide any further guidance as to what will constitute adequate documentation. In our view, a practical solution to the fulfilment of this requirement may be to log, among others, the Member States in which and the periods during which the pre-marketing is taking place, the content of the pre-marketing, including the presented information, a list of the AIFs and compartments of AIFs which are the subject of the pre-marketing, a list of the potential investors who have been approached and the compliance with any applicable formal requirements.

The EU AIFM shall ensure that investors do not acquire units or shares in an AIF through pre-marketing. Any subscription by professional investors, within 18 months of the EU AIFM having begun pre-marketing, to units or shares of an AIF referred to in information provided in the context of pre-marketing, or of an AIF established as a result of the pre-marketing, shall be considered to be the result of marketing. Consequently, prior to offering a final subscription document, the applicable notification procedures referred to in Articles 31 and 32 of the AIFMD must have been completed.

Pursuant to the Regulation (as defined below), similar provisions will be introduced to Regulation (EU) no. 345/2013 of the European Parliament and of the Council of 17 April 2013 on European venture capital funds and Regulation (EU) No 346/2013 of the European Parliament and of the Council of 17 April 2013 on European social entrepreneurship funds on 2 August 2021.

2. Alignment of the procedure for de-registration for marketing

In order to harmonize the procedure for de-registration for marketing of a UCITS between Member States, new provisions are introduced in the Directive to align the procedure for de-registration of UCITS and EU AIFs.

Accordingly, certain conditions are to be fulfilled in order to de-register a UCITS or an EU AIF, including (i) except in the case of closed-ended AIFs and funds regulated by Regulation (EU) 2015/760, a blanket offer must be made to repurchase or redeem, free of charges or deductions, all units or shares held by investors in the relevant Member State, (ii) the intention to terminate arrangements made for marketing must be made public, and (iii) any contractual arrangements with financial intermediaries or delegates must be modified or terminated with effect from the date of de-registration in order to prevent further offering or placement of the units or shares. The notification to de-register for marketing must be filed with the competent authorities in the home Member State of the UCITS for onward transmission to the host Member State and the European Securities and Markets Authority (ESMA).

3. Alignment of the procedure for notifying competent authorities of changes

A UCITS must notify the national competent authority in both its home and host Member State at least one month before implementing a change to the information or documentation contained in a marketing notification letter previously submitted to a national competent authority. If, pursuant to a change, the UCITS would no longer comply with the UCITS Directive (as amended), the competent authorities of the home Member State shall (i) inform the UCITS within 15 working days that it is not to implement the change and (ii) notify the competent authorities of any host Member State of the measures taken. If the change is nonetheless implemented and the UCITS consequently no longer complies with the UCITS Directive, the competent authorities of the home Member State of the UCITS shall take all appropriate measures and shall notify the competent authorities of any host Member State of the measures taken.

Similar provisions apply to an AIFM pursuant to the AIFMD (as amended).

4. New requirements as to the provision of facilities to local investors

A UCITS will be required to make available certain facilities in all Member States where it intends to market its units, e.g. for processing of subscriptions and redemptions; making available information and documents; and acting as a contact point for communicating with competent authorities. Such facilities can either be in the form of a physical presence or e.g. a website provided in the official language of the Member State.

To ensure a level playing field among collective investment undertakings, similar requirements to provide facilities are imposed for an AIFM in all Member States where it intends to market units or shares of an AIF to retail investors. A UCITS or AIFM will not be required to have a physical presence in a host Member State.

NEW REGULATION ON FACILITATING CROSS-BORDER DISTRIBUTION OF COLLECTIVE INVESTMENT UNDERTAKINGS

Regulation (EU) 2019/1156 of 20 June 2019 on facilitating cross-border distribution of collective investment undertakings and amending Regulations (EU) No 345/2013, (EU) No 346/2013 and (EU) No 1286/2014 (the "Regulation") entered into force on 1 August 2019.

The regulation applies to AIFMs, UCITS management companies, UCITS which has not designated a UCITS management company, EuVECA managers and EuSEF managers (each as defined in the Regulation).

Among other things, the Regulation provides for the following:

1. Uniform rules on marketing communications requirements

Today, Article 77 of the UCITS Directive contained obligations on UCITS marketing communications. In order to introduce a level playing field between UCITS and AIFs and to safeguard investor protection, the Regulation introduces requirements as to marketing communications, which will apply to UCITS management companies, AIFMs, EuVECA managers and EuSEF managers (each a "Manager") from 2 August 2021.

A manager is required to ensure that marketing communication meets certain standards set out in the Regulation, including, among others:

- a) all marketing communications addressed to investors must be identifiable as such;
- b) all information included must be fair, clear and not misleading;
- c) the risks and rewards of purchasing units or shares of an AIF or UCITS (as applicable) must be described in an equally prominent manner; and
- d) marketing communications must not contradict or diminish the significance of information contained in the relevant prospectus or key investor information and must indicate the existence and availability of these documents.

For the purpose of verifying compliance with the Regulation and with national provisions concerning marketing requirements, competent authorities may require prior notification of marketing communications which (i) UCITS management companies and (ii) AIFMs, EuVECA managers or EuSEF managers marketing units or shares of their AIFs to retail investors, respectively, intend to use directly or indirectly in their dealings with investors. Competent authorities that require prior notification of marketing communications shall establish, apply, and publish on their websites, procedures for such prior notification.

2. Publication of national provisions concerning marketing requirements

From 2 August 2021, the competent authorities in Member States shall publish and maintain on their websites up-to-date and complete information on the applicable national laws, regulations and administrative provisions governing marketing requirements for AIFs and UCITS, and summaries thereof.

By 2 February 2022, ESMA shall publish and maintain on its website a central database containing the summaries of national provisions and hyperlinks to the websites of the national competent authorities.

3. Central database on cross-border marketing

By 2 February 2022, ESMA shall publish on its website a central database on cross-border marketing of AIFs and UCITS, listing:

- a) all AIFs that are marketed in a Member State other than the home Member State, their AIFM, EuSEF manager or EuVECA manager, and the Member States in which they are marketed; and
- b) all UCITS that are marketed in a Member State other than the UCITS home Member State (as defined in Directive 2009/65/EC), their UCITS management company and the Member States in which they are marketed.

On a quarterly basis, competent authorities of home Member States shall communicate to ESMA the information which is necessary for the creation and maintenance of the central database.

4. Common principles concerning fees or charges

Where fees or charges are levied by competent authorities for carrying out their duties in relation to the cross-border activities of Managers, such fees or charges shall be consistent with the overall cost relating to the performance of the functions of the competent authority.

For such fees or charges, the competent authority shall send an invoice or another form of payment instruction to the address of the Manager is notified to the competent authority.

By 2 February 2020, competent authorities shall publish and maintain up-to-date information on their websites listing their fees or charges or, where applicable, the calculation methodologies for those fees or charges. By 2 February 2022, ESMA shall (i) publish on its website hyperlinks to the websites of competent authorities and (ii) develop and make available on its website an interactive tool that provides an indicative calculation of the fees or charges.

CONCLUSION

The Directive and Regulation enhances the regulatory framework for cross-border distribution of collective investment undertakings in the EU, in particular by the introduction of a uniform concept of pre-marketing of AIFs and the alignment of the procedure for de-registration for marketing. By removing regulatory barriers and increasing harmonisation, the new rules will hopefully create greater certainty for Managers and facilitate the cross-border distribution of collective investment undertakings across the EU. However, due to the introduction of certain new requirements, including in respect of the procedure for notifying competent authorities of changes to fund information, Managers should be aware of any new procedures that may need to be implemented in their business prior to the coming into force of the majority of the new provisions on 2 August 2021.

FURTHER INFORMATION

[Read the Directive in full](#)
[Read the Regulation in full](#)