

ATOZ ALERT



EU legislative proposals to facilitate the cross-border distribution of investment funds

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On 12 March 2018, in the context of the Capital Markets Union Action Plan and further to consultations conducted by the European Commission with national competent authorities (**NCA**s), industry associations and other stakeholders, the European Commission issued legislative proposals to amend the existing legal framework for the cross-border distribution of investment funds in the EU. These proposals contain a Directive, which would have to be implemented into local legislation, and a Regulation which would have direct effect in EU Member States (the **Proposals**).

These Proposals aim at modifying the AIFM and UCITS Directives as well as introducing a regulation to standardise the requirements for cross-border distribution of both AIFs and UCITS in the EU. The objectives of the Commission are to reduce regulatory barriers, including those pertaining to marketing requirements, regulatory fees, and administrative and notification requirements, as well as to reduce the costs for fund managers and to actively enhance the volume of funds that are marketed in the EU.

Positive aspects – harmonisation, facilitation and clarifications

In an attempt to harmonise disparate national regimes in the EU:

- a legal definition of “**pre-marketing**” is introduced for AIFs, EuVECA (European Venture Capital Funds) and EuSEF (European Social Entrepreneurship Funds), containing guidelines that are designed to enable fund managers to test investor appetite in relation to their product;
- **marketing communication requirements** should be harmonised for all type of funds, subject to further guidelines that will be available two years after the introduction of the regulation. A particular emphasis should be put on requirements applicable to online marketing communications. NCAs would continue to have the authority to make **systematic verification of marketing communications** for UCITS and AIFs that are marketed to retail investors. However, the Commission wants to discourage NCAs from using this verification process as a basis to add pre-conditions to marketing;
- no **physical presence** (i.e. paying agent) would be required in Member States where funds are marketed, removing a few gold-plating requirements that some EU jurisdictions are still imposing. The Proposals only refer to the provision of **facilities** to UCITS investors and retail investors investing in AIFs for the processing of their subscription and redemption orders as well as payments. Investors should have access to offering documents and annual reports in a durable medium and in the relevant jurisdiction’s official/accepted language – this will usually be done through (password-protected or not) specific online access;

- in a move to foster transparency, the fees and charges as well as the calculation methodologies applied by NCAs will have to be made public by these regulators (although this is already the case in most – but not all – of the EU jurisdictions). Furthermore, ESMA intends to centralise this information and propose an interactive tool allowing fund managers to simulate the costs of managing and marketing investment funds in EU Member States;
- deadlines and notification procedures for implementing changes to marketing/branching arrangements relating to UCITS will be aligned with applicable procedures under the AIFM Directive;
- a process is established to enable AIFs and UCITS fund managers to **discontinue marketing activities** once such activities have become insignificant in a specific jurisdiction. The suggestion of the Proposals appears however to add some requirements since fund managers would have to make a blanket offer to redeem free of charge all the interests/shares of relevant investors that are left in the relevant jurisdiction, notify their decision to withdraw their authorisation to market funds to the supervisory authorities of their home Member State, and ensure that no more than ten investors located in the relevant jurisdiction still hold an interest greater than 1% of the fund's assets under management.

What's missing – there is still room for improvement

We believe that some parts of the Proposals may still be improved:

- while setting a definition of “**pre-marketing**” under the AIFM Directive was expected by the industry in order to create harmony among the EU Member States' constructions and to create a level playing field, the scope of application of pre-marketing in the Proposals is extremely narrow. If pre-marketing is in any way restricted to providing information on investment strategies or investment ideas without being able to refer to an established AIF and if pre-marketing prevents fund managers from submitting draft offering documents (containing relevant disclaimers), fund managers' promotional activities will easily fall into a regulated marketing activity requiring full registration. Therefore, in some jurisdictions where pre-marketing has been forbidden, progress will be made. However, considering the current state of the Proposals, some jurisdictions may be subject to new restrictions. In any case, the fund manager cannot provide information enabling investors to commit or subscribe to shares, interests or units in an AIF;
- creating consistency on the way **regulatory fees** are applied in Europe is one of the objectives of the Proposals, but will only consist in broad guidelines while host Member States supervisory authorities will be in a position to charge fees that are proportionate to the supervisory activity they carry out in this context.

Central role of ESMA in the implementation of the new cross-border regime

The regulation empowers ESMA to develop draft **technical standards** to specify the information and procedures for the transmission of information between fund managers, NCAs and ESMA. The harmonisation of the administrative process will only see the light of day two years after the regulation enters into force, at the earliest.

ESMA will take a central role in promoting EU-wide transparency and consistency for AIFs and UCITS marketing practices and requirements. As set out above, ESMA will (i) centralise and review the NCAs' laws, regulations, administrative circulars and standards with regards to the verification of marketing material compliance, (ii) gather information on fees and charges, (iii) review the different EU Member States applicable legislation and administrative requirements to provide a comprehensive summary in plain language, customarily used in international finance, and also (iv) keep a register of all AIFs, UCITS and fund managers using the EU marketing/management passports.

An overall positive legislative proposal

The Proposals' shortcoming is the fact that it leaves out some factors which currently impede the cross-border distribution of investment funds in the EU, such as national tax regimes applicable to investment funds and investors, vertical distribution channels and cultural preferences for domestic investment products. Even though the Proposals fall short of removing all barriers to the cross-border distribution of investment funds, they have the merit of reducing differences, reinforcing transparency and giving clarity on marketing rules and practices. The Commission expects the Proposals to be adopted before the EU Parliament elections in 2019. The Proposals will now be reviewed by the EU Parliament and Council and there is little doubt that there will be additional developments in the course of the coming months. Stay tuned!

Can we help? Do you have further questions?



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