

Cross-border Distribution of Investment funds Legislative Tracker

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The Simmons & Simmons Cross-border Distribution Directive & Regulation Legislative Tracker

This Legislative Tracker provides you with an update on the EU's legislative proposals for a Directive and Regulation on the cross-border distribution of collective investment funds Regulation, setting out:

- a high level background to, and summary of the main aims of, the Cross-border Distribution Regulation and Directive
- a table of the key dates in the process of agreeing the Level 1 text (with links to the relevant documents)
- an annex setting out what specific Level 2 / Level 3 measures ESMA must develop, the timing of ESMA's work (where known) and which ESMA document (discussion paper, consultation paper or Final Report) deals with each measure.

Background

On 12 March 2018, the European Commission (Commission) adopted proposals to change and align a number of the rules governing cross-border distribution of alternative investment funds (AIF) and undertakings for collective investment in transferable securities (UCITS).

Following its work on building a more efficient capital markets union, the Commission identified a number of barriers to the efficient cross-border marketing of investment funds throughout the EU. These include: differing marketing requirements, regulatory fees and notification requirements. The Commission's proposals aim to reduce the cost to fund managers of cross-border marketing of investment funds, while giving investors in the EU greater choice and better value.

The changes would also serve to remove inefficiencies and bring greater harmonisation to cross-border marketing (a) between the UCITS and Alternative Investment Fund Managers Directive (AIFMD) regimes and (b) between certain practices adopted by Member States.

Summary

On 12 March 2018, the Commission adopted proposals for a Directive and for a Regulation. These aim to:

- eliminate regulatory barriers to the cross-border distribution funds
- improve transparency by aligning national marketing requirements and regulatory fees
- introduce consistency in the way regulatory fees are determined
- harmonise the process and requirements for the verification of marketing material by national competent authorities (NCAs)
- allow managers to 'pre-market' a fund, in order to "test potential investors' appetite" for new investment strategies
- enable ESMA to better monitor investment funds

When publishing its legislative proposals, the Commission invited feedback on the initiatives. The deadline for comments passed in May 2018.

The Council of the EU has now agreed its negotiating mandate (or general approach) in respect of the proposals. The European Parliament is still in the process of scrutinising them. Once both institutions have settled their initial positions, they will be joined by the Commission in a series of trilogue negotiations, which should lead to agreement on final Level 1 texts.

The Commission's intention is that these texts will be adopted before the European Parliament elections in May 2019.

Both the proposed Regulation and Directive would enter into force twenty days after publication in the Official Journal of the EU (OJ). There would then be a 24-month transposition period, meaning that the legislation is not likely to come into force before 2021.

Scope

The changes are contained in two proposed texts, one in the form of a Directive, the other a Regulation, and are aimed primarily at UCITS management companies (ManCos) and managers of AIFs (together referred to as "managers", where applicable, for the purposes of this Note).

The proposals represent an attempt by the Commission to introduce greater consistency between the EU's investment fund regimes, rather than a comprehensive update of AIFMD generally. Nor do the proposals have an impact on the extension of the AIFMD marketing passports to non-EU AIFMs and the consequential switching off of national private placement regimes (NPPRs).

Summary of key provisions:

Draft Directive

The Commission's proposed Directive contains a number of important provisions. These are summarised below. It should be noted that some or all of these are likely to be amended as part of the trilogue negotiations, so the summary below may differ from the final legislative text.

(i) Pre-marketing under AIFMD (Article 30a)

The proposed Directive creates a definition of "pre-marketing" for the AIFMD, whereby authorised EU AIFMs could provide information to professional EU investors to test the appetite for an AIF which is yet to be established, without this being considered formal 'marketing' of the AIF law, therefore not triggering the need to notify the relevant NCA.

Information provided as part of 'pre-marketing' must not contain reference to an already established AIF nor include a prospectus or offering document (whether in draft or final form) in respect to an AIF which is yet to be established.

(ii) Changes in relation to local facilities for UCITS and AIFs sold to retail investors (Article 43a)

Under the existing UCITS Directive the UCITS ManCo must ensure that facilities are available in each jurisdiction in which the UCITS is registered for sale that perform the following tasks:

- processing investors' subscriptions, payment repurchase, or redemption orders relating to units or shares in the AIF.
- providing investors with information on how orders can be made and how repurchase, and redemption proceeds are paid.
- facilitating the handling of information relating to the exercise of investors' rights arising from their investment.
- making fund rules or instruments of incorporation and the latest annual report of the AIF available for inspecting for obtaining copies

The proposal, both (a) prevents Member States from requiring these facilities be provided through a physical presence in their territory and (b) extends the provision to cover AIFs (whether EU or non-EU), if being marketed to retail investors.

(iii) Discontinuing the marketing of a UCITS or AIF in a host Member State (Article 93a)

The proposal would permit a manager to discontinue marketing of a UCITS or EU AIF in a Member State where that UCITS or AIF has a maximum of ten investors which hold up to 1% of the fund's total AuM in that Member State.

The manager must make a blanket offer to repurchase all shares or units held by investors in the Member State in which marketing is to be discontinued, the offer being made public for at least 30 working days.

(iv) Aligning national procedures on certain notifications (Article 1)

An EU AIFM wishing to market an EU AIF in a Member State other than its home Member State must notify its NCA of its intention to do so and provide specified information.

Where there is a material change to this information, the NCA in question must inform

- the AIFM, if it determines that the change would mean that the AIFM was not in compliance with AIFMD or
- the NCA of the host Member State, if the change is acceptable.

The Commission's proposals would harmonise the deadlines by which the manager's NCA must either respond to the manager or notify the host NCA.

Similar provisions apply in respect of a UCITS ManCo which has notified its home NCA of its intention to establish a brand or market a UCITS in another Member State but where there has subsequently been a change in the information provided.

Draft Regulation

The Commission's proposed Regulation contains a number of important provisions. These are summarised below. It should be noted that some or all of these are likely to be amended as part of the trilogue negotiations, so the summary below may differ from the final legislative text.

(i) Marketing communications to investors (Article 2)

The proposals would align marketing communications made by UCITS ManCo and AIFM, by requiring them to:

- be identifiable as such
- be fair, clear and not misleading and
- present the risks and rewards of purchasing shares or units of an AIF or UCITS in an equally prominent manner.

UCITS ManCos would have to ensure that all marketing communications indicate that a prospectus exists, that the key investor information document (KIID) is available and where, how and in what language these documents can be obtained.

An AIFM must comply with similar requirements in respect of an AIF which is required to publish a prospectus or a PRIIPs KID.

(ii) Publication of national marketing requirements (Article 3 & 4)

The NCA of each Member State would be required:

- to publish a central database which contains “all applicable national laws, regulations and administrative provisions governing marketing rules for AIFs and UCITS, and the summaries thereof, at least in a language customary in the sphere of international finance”
- to notify these laws, regulations and provisions to ESMA and
- to notify ESMA without delay in the event of any change in the information provided.
- ESMA would also be required to maintain a central database which contains the laws, regulations and provisions notified to it.

(iii) Verification of marketing communications (Article 5)

Where an NCA requires a UCITS ManCo or an AIFM marketing an AIF to a retail investor to notify it of any marketing material it intends to use, the NCA must:

- within 10 working days of receiving its notification, inform the manager of any request to amend its marketing communications
- publish on its website the internal rules and procedures for such notification, and
- report annually to ESMA on decisions taken in the previous 12 months where it has either rejected or sought adaptation of any such marketing communication.

(iv) Fees and charges (Articles 6 - 9)

An NCA would be required to notify ESMA of its levels of fees and charges and, where applicable, the methodology for calculating these as well as informing,

ESMA where any previously provided information had changed.

An NCA would also have to publish and maintain a central database on its websites on the fees and charges or relevant calculation methodologies.

ESMA would be required to maintain a centralised database of these fees and charges, featuring an interactive tool allowing users to perform online calculations.

(v) Central database of all managers, AIFs and UCITS (Article 10)

Within 30 months of the Regulation entering into force, ESMA would have to publish and maintain on its website a publicly accessible central database of all AIFMs, UCITS ManCos, AIFs and UCITS.

Next steps

The Commission published its legislative proposals for the Regulation and Directive in March 2018.

The Council of the EU has now agreed its negotiating mandate (or 'general approach') in respect of the proposals. The European Parliament is still in the process of scrutinising them. Once both institutions have settled their initial positions, they will be joined by the Commission in a series of trilogue negotiations, which should lead to agreement on final Level 1 texts.

The Commission's intention is that these texts will be adopted before the European Parliament elections in May 2019.

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Neil Simmonds
Partner – London

Financial Markets

D +44 20 7825 3151

E neil.simmonds@simmons-simmons.com



Mahrie Webb
Partner – London

Financial Markets

D +44 20 7825 2077

E mahrie.webb@simmons-simmons.com



Catherine Weeks
Partner – London

Financial Markets

D +44 20 7825 3940

E catherine.weeks@simmons-simmons.com

Where are we in the process?

Table 1: Key stages in development of Level 1 text

Directive

Level 1 Text	Date
Commission <i>proposal</i>	12 March 2018
<i>Council General Approach</i>	15 June 2018
European Parliament draft report	
European Parliament text adopted in plenary vote	
Political Agreement	
European Parliament adoption	
Council endorsement	
Publication in OJ	
Entry into force	
Comes into effect	

Regulation

Level 1 Text	Date
<i>Commission proposal</i>	12 March 2018
<i>Council General Approach</i>	15 June 2018
<i>European Parliament draft report</i>	18 September 2018
European Parliament text adopted in plenary vote	
Political Agreement	
European Parliament adoption	
Council endorsement	
Publication in OJ	
Entry into force	
Comes into effect	

Table 2: Development of Level 2 / Level 3 measures

CP	Covers	Published	Closes	Submission to Commission
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ESMA is not yet undertaking any work to develop Level 2 or Level 3 measures.