

Revised EuVECA and EuSEF Regulations Legislative Tracker

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The Simmons & Simmons Revised EuVECA and EuSEF Regulations Legislative Tracker

This Legislative Tracker provides you with an update on the EU's Regulation to amend the European Social Entrepreneurship Funds (EuSEF) and European Venture Capital Funds (EuVECA) Regulations, setting out:

- a high level background to, and summary of the main aims of, the Regulation and further initiatives to amend the EuVECA and EuSEF Regulations, and
- a table of the key dates, when available, in the process of agreeing the Level 1 text (with links to the relevant documents).

Background

The [European Social Entrepreneurship Funds \(EuSEF\) Regulation](#) and the [European Venture Capital Funds \(EuVECA\) Regulation](#) (together, the Regulations) came into effect across the European Union (EU) on 22 July 2013.

The original aim of the Regulations was to create new opportunities for market participants to raise and invest capital in innovative small and medium-sized enterprises (SMEs) and social undertakings throughout Europe. EuVECA's are intended to support young and innovative companies, while EuSEF's focus on investment in enterprises whose aim is to achieve positive social impact.

Requirements for qualification as a EuVECA/EuSEF or as a manager of a EuVECA/EuSEF

The Regulations impose a number of restrictions and limitations on both the EuVECA's and/or EuSEF's themselves and their managers (AIFMs).

- For a fund to qualify as a EuVECA or EuSEF, it must:

- be established in the EU
- be a “collective investment undertaking”, other than a UCITS, which would qualify as an “alternative investment fund” (AIF) under the Alternative Investment Fund Managers Directive (AIFMD)
- intend to invest 70% or more of its aggregate capital contributions and uncalled committed capital in defined “qualifying investments” and
- not use leverage (other than in strictly limited circumstances).
- The AIFM of a EuVECA or EuSEF must:
 - be established in the EU
 - be registered with its home Member State regulator.
 - manage assets under below the threshold set out in Article 3(2)(b) of AIFMD (i.e., managing unleveraged portfolios of less than EUR 500m with a minimum 5 year lock-in).

Marketing passport under AIFMD

In return for compliance with these (and other) restrictions, qualifying funds may “opt in” to an EU-wide marketing passport, under which an AIFM which is registered in one Member State may market qualifying funds as a EuVECA or EuSEF (as applicable) in all other Member States to:

- professional clients (as defined in MiFID) or those who can be treated as such
- other investors investing at least EUR 100,000, who have certified that they are aware of the inherent risks of investment
- executives, directors and employees involved in the management of the EuVECA or EuSEF.

Review of the Regulations

Uptake of the new fund types was disappointing. In the first two years, only 34 EuVECAs were registered, which, between them, aimed to raise EUR 1.3bn in capital - well below the EUR 4bn which the European Commission (Commission) had anticipated. In the same period, only six EuSEFs were registered, with an aggregate capital target of EUR 6m.

Each Regulation contained provision for a review after two years. However, since the rules were clearly not functioning as well as had been expected, the Commission brought the reviews forward.

As part of this process, and, in parallel with its [Capital Markets Union \(CMU\) Action Plan](#), the Commission undertook a [public consultation](#) between September 2015 and January 2016, seeking views on a number of areas where feedback to its February 2015 CMU [Green Paper](#) had indicated that improvements could be made to the existing regimes, in particular:

- the rules that govern the way in which such funds may invest in assets
- the way in which managers run such funds
- how the Regulations interact with other existing investment fund law and
- the requirements with which EuSEFs and EuVECAs must comply in order to benefit from the marketing passport.

Summary

Following its review, on 14 July 2016, the Commission adopted a [proposal for a new Regulation](#), to amend the existing Regulations.

On 10 November 2017, following agreement with the European Parliament (the EP) and the Council of the EU (the Council), [Regulation \(EU\) 2017/1991](#) ('the Amending Regulation') was published in the Official Journal of the EU, which will introduce a number of amendments to the EuVECA and EuSEF Regulations.

Among its key provisions, the Amending Regulation:

- confirms that AIFMs which are authorised under AIFMD (i.e., those above the threshold in Article 3(2)(b) of AIFMD) are entitled to use the "EuVECA" and "EuSEF" designations when marketing such funds in the EU. Previously, such usage had been restricted to sub-threshold AIFMs
- streamlines the process for registration by:
 - providing that the competent authority of its home Member State must inform an AIFM whether it has been registered no later than two months after it has submitted all necessary information and
 - avoiding duplicative registration processes under the Regulations and under AIFMD
- requires the AIFM to register the EuVECA or EuSEF and to comply with specific provisions under the respective Regulation
- allows EuVECAs and EuSEFs to be registered by authorised AIFMs in a different Member State from than that in which the AIFM is authorised
- redefines the definition of a "qualifying portfolio undertaking" in the EuVECA Regulation by permitting investment in either:
 - unlisted undertakings which employ up to 499 persons (rather than 250 people as before) or
 - SMEs listed on a SME growth market.

The Amending Regulation also permits follow-on investments in qualifying portfolio undertakings, provided the undertaking met the necessary criteria at the time of the EuVECA's first investment

- imposes a minimum initial capital requirement of EUR 50,000 for both internally managed vehicles and for external managers
- imposes additional own fund requirements (of 0.02% of the excess amount) where the value of the qualifying funds managed by a manager exceeds EUR 250 million
- ensures that ESMA's central database includes information concerning all EuVECA and EuSEF AIFMs and the funds that they market.

Following trilogue negotiations between the EP, the Council and the Commission, political agreement on a Level 1 text was reached on 30 May 2017. This text was formally adopted at a plenary session of the EP on 14 September 2017, endorsed by the Council on 09 October 2017 and published in the Official Journal of the EU on **10 November 2017**.

Its provisions formally entered into force on the twentieth day following publication and has been applicable from **01 March 2018**.

Review of the Regulations following the Commission's Proposal to reform the European System of Financial Supervision

On 20 September 2017, the Commission adopted a [Proposal for a Regulation](#) (the ESA Proposal) to amend (among other measures) the Regulations which established the European Supervisory

Authorities (i.e., the European Banking Authority, the European Insurance and Occupational Pensions Authority and the European Securities and Markets Authority).

As part of the ESA Proposal, the Commission put forward changes to the EuVECA and EuSEF Regulations, under which, ESMA would become the single supervisory body for EuVECA and EuSEFs in order to ensure consistent application across all Member States. Where the EuVECA or EuSEF exceeded the Article 3 threshold under AIFMD, ESMA would ensure that the affected managers complied with the national law of the AIFM by which AIFMD was implemented.

Under the ESA Proposal, ESMA would also be granted the power to conduct investigations and on-site inspections for these types of funds.

The ESA Proposal will now be subject to scrutiny by the EP and the Council.

Amendment of the Regulations further to the Commission's Proposal on cross-border distribution of collective investment funds

On 12 March 2018, the Commission adopted legislative proposals for (a) a Directive and (b) a Regulation amending the AIFMD and the UCITS Directive in relation to the cross-border distribution of funds.

The proposal for a Directive would amend the EuVECA and EuSEF Regulations to allow managers of such funds to target investors by testing their appetite for upcoming investment opportunities or strategies through 'pre-marketing'.

The proposals are now subject to scrutiny by the EP and the Council, with the intention of the Commission being that the final text will be agreed before the European Parliamentary elections in May 2019.

Where are we in the process?

Table 1: Key stages in development of Level 1 text

Level 1 Text	Date
Commission proposal	14 July 2016
Council compromise proposal	22 September 2016
Council compromise proposal (2)	11 October 2016
Council compromise proposal (3)	24 October 2016
Council compromise proposal (4)	28 November 2016
Council General Approach	16 December 2016
European Parliament - ECON draft report	13 December 2016
European Parliament - ECON final report	30 March 2017
Political Agreement	30 May 2017
Adoption by the EP	14 September 2017
Endorsement by Council	09 October 2017
Publication in OJ	10 November 2017
Entry into force	Twentieth day following publication
Date of application	01 March 2018
<u>ESA Proposal</u>	
Commission ESA Proposal	20 September 2017
<u>Cross border distribution proposals</u>	
Commission Proposal for a Directive	12 March 2018
Commission Proposal for a Regulation	12 March 2018

Table 2: Development of Level 2 / Level 3 measures

There are currently no discussion or consultation papers on Level 2/Level 3 measures.



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ANNEX

1. Level 2 Measures

The [Amending Regulation](#) contains a number of areas in which ESMA is either permitted or mandated to develop Level 2 measures in respect of both the EuVECA Regulation and the EuSEF Regulation.

The measures to be developed are essentially identical in the two Regulations and the relevant provisions from both Regulations are set out together below – where there are differences, the text is contained in square brackets and references from the EuVECA Regulation are put before those from the EuSEF Regulation.

The Level 2 measures are in respect of:

- A. Applications for registration of the manager - **Article 14** of the EuVECA Regulation / **Article 15** of the EuSEF Regulation
- B. Applications for registration of the fund - **Article 14a** of the EuVECA Regulation / **Article 15a** of the EuSEF Regulation
- C. Organisation and conduct of peer reviews of the registration - **Article 16a** of the EuVECA Regulation / **Article 17a** of the EuSEF Regulation

Looking at each measure in turn:

A. Applications for registration of the manager - (Article 14 of the EuVECA Regulation / Article 15 of the EuSEF Regulation)

(i) What does Level 1 say?

Article 14 of the EuVECA Regulation and **Article 15** of the EuSEF Regulation state that:

1. Managers of qualifying [venture capital / social entrepreneurship] funds that intend to use designation ["EuVECA" / "EuSEF"] for the marketing of their qualifying [venture capital / social entrepreneurship] funds shall inform the competent authority of their home Member State of their intention and shall provide the following information:
 - (a) the identity of the persons who effectively conduct the business of managing qualifying [venture capital / social entrepreneurship] funds;
 - (b) the identity of the qualifying [venture capital / social entrepreneurship] funds, the units or shares of which are to be marketed and their investment strategies;
 - (c) information on the arrangements made for complying with the requirements of Chapter II;
 - (d) a list of Member States where the manager of a qualifying [venture capital / social entrepreneurship] fund intends to market each qualifying [venture capital / social entrepreneurship] fund.
2. The competent authority of the home Member State shall only register the manager of a qualifying [venture capital / social entrepreneurship] fund if the following conditions are met:
 - (a) the persons who effectively conduct the business of managing qualifying [venture capital / social entrepreneurship] funds are of sufficiently good repute and are sufficiently experienced also in relation to the investment strategies pursued by the manager of a qualifying [venture capital / social entrepreneurship] fund;
 - (b) the information required under paragraph 1 is complete;

- (c) the arrangements notified according to point (c) of paragraph 1 are suitable for complying with the requirements of Chapter II.

(ii) What is ESMA’s mandate?

Article 14(7) of the EuVECA Regulation and **Article 15(7)** of the EuSEF Regulation each empowers ESMA to adopt regulatory technical standards (RTS) specifying the information to be provided to the competent authorities in the application for registration as set out in **Article 14(1)** or **Article 15(1)** and to further specify the conditions as set out in **Article 14(2)** or **Article 15(2)** as applicable.

Article 14(8) of the EuVECA Regulation and **Article 15(8)** of the EuSEF Regulation each empowers ESMA to adopt implementing technical standards (ITS) on standard forms, templates and procedures for the provision of information to the competent authorities in the application for registration set out in **Article 14(1)** or **Article 15(1)** and the conditions set out in **Article 14(2)** or **Article 15(2)** as applicable

(iii) Timing

The Level 1 text specifies no time limit by which ESMA must develop draft RTS under **Article 14(7)** of the EuVECA Regulation or **Article 15(7)** of the EuSEF Regulation.

The Level 1 text specifies no time limit by which ESMA must develop draft ITS under **Article 14(8)** of the EuVECA Regulation or **Article 15(8)** of the EuSEF Regulation.

ESMA proposes to consult on these measures but is yet to do so.

B. Applications for registration of the fund - (Article 14a of the EuVECA Regulation / Article 15a of the EuSEF Regulation)

(i) What does Level 1 say?

Article 14a of the EuVECA Regulation and **Article 15a** of the EuSEF Regulation state that:

1. Managers of collective investment undertakings authorised under Article 6 of Directive 2011/61/EU shall apply for registration of the qualifying venture capital funds for which they intend to use the designation [“EuVECA” / “EuSEF”].
2. The application for registration referred to in paragraph 1 shall be made to the competent authority of the qualifying venture capital fund and shall include the following:
 - (a) the rules or instruments of incorporation of the qualifying venture capital fund;
 - (b) information on the identity of the depositary;
 - (c) the information referred to in [Article 14(1) / Article 15(1)];
 - (d) a list of Member States where the managers referred to in paragraph 1 have established, or intend to establish, qualifying venture capital funds.

For the purposes of point (c) of the first subparagraph, the information on the arrangements made for complying with the requirements of Chapter II shall refer to the arrangements made for complying with Articles 5 and 6 and points (c) and (i) of [Article 13(1) / Article 14(1)].

(ii) What is ESMA's mandate?

Article 14a(8) of the EuVECA Regulation and **Article 15a(8)** of the EuSEF Regulation each empowers ESMA to adopt regulatory technical standards (RTS) specifying the information to be provided to the competent authorities in accordance with **Article 14a(2)** or **Article 15a(2)** as applicable.

Article 14a(9) of the EuVECA Regulation and **Article 15a(9)** of the EuSEF Regulation each empowers ESMA to adopt implementing technical standards (ITS) on standard forms, templates and procedures for the provision of information in accordance with **Article 14(2)** or **Article 15(2)** as applicable

(iii) Timing

The Level 1 text specifies no time limit by which ESMA must develop draft RTS under **Article 14a(8)** of the EuVECA Regulation or **Article 15a(8)** of the EuSEF Regulation.

The Level 1 text specifies no time limit by which ESMA must develop draft ITS under **Article 14(9)** of the EuVECA Regulation or **Article 15(9)** of the EuSEF Regulation.

ESMA proposes to consult on these measures but is yet to do so.

C. Organisation and conduct of peer reviews of the registration processes- (Article 16a of the EuVECA Regulation / Article 17a of the EuSEF Regulation)

(i) What does Level 1 say?

Article 16a(1) of the EuVECA Regulation and **Article 17a(1)** of the EuSEF Regulation state that:

For the purpose of organising and conducting peer reviews in accordance with Article 14(9) and Article 14a(10) the competent authority of the home Member State or, where different, the competent authority of the qualifying venture capital fund, shall ensure that the final information on the basis of which the registration was granted as set out in Article 14(1) and (2) and Article 14a(2) is made available to ESMA in a timely manner after the registration. Such information shall be made available by means of the procedure referred to in Article 22.

Article 14(9) and **Article 14a(10)** of the EuVECA Regulation and **Article 15(9)** and **Article 15a(10)** of the EuSEF Regulation state that:

ESMA shall organise and conduct peer reviews in accordance with Article 30 of Regulation (EU) No 1095/2010 in order to strengthen the consistency of the registration processes carried out by competent authorities pursuant to this Regulation.

(ii) What is ESMA's mandate?

Article 16a(2) of the EuVECA Regulation and **Article 17a(2)** of the EuSEF Regulation each empowers ESMA to develop draft regulatory technical standards specifying the information to be made available to ESMA in accordance with **Article 16a(1)** or **Article 17a(1)** as applicable.

Article 16a(3) of the EuVECA Regulation and **Article 17a(3)** of the EuSEF Regulation each mandates ESMA to develop draft implementing technical standards on standard forms, templates and procedures for the provision of information to be made available to ESMA in accordance with **Article 16a(1)** or **Article 17a(1)** as applicable.

(iii) Timing

The Level 1 text specifies no time limit by which ESMA must develop draft RTS under **Article 16a(1)** of the EuVECA Regulation or **Article 17a(1)** of the EuSEF Regulation.

The Level 1 text specifies no time limit by which ESMA must develop draft ITS under **Article 16a(1)** of the EuVECA Regulation or **Article 17a(1)** of the EuSEF Regulation.

ESMA does not intend to consult publicly on these measures.

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