

# ELTIF Legislative Tracker

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## The Simmons & Simmons ELTIF Legislative Tracker

This Legislative Tracker provides you with an update on the ELTIF Regulation, setting out:

- a high level summary of the main aims of the Regulation
- a table of the key dates in the process of agreeing the Level 1 text (with links to the relevant documents) and
- an annex setting out what specific Level 2 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.

## Summary

The European Commission's **Regulation on European Long-Term Investment Funds** (the Regulation) creates a new type of collective investment vehicle that allows retail and professional investors to invest in companies and projects that need long-term capital. The intention of the Regulation is that, by restricting the asset classes in which an ELTIF can invest, the new vehicles will provide investors with long-term, stable returns and help stimulate employment and economic growth in the EU by increasing investment in, for example, infrastructure projects.

To qualify as an ELTIF, a fund must (among other things):

- **be an EU AIF** - funds must apply for authorisation as an ELTIF
- **have an EU authorised AIFM** - ELTIFs must be managed and offered by an investment manager who is authorised under the AIFMD
- **invest at least 70% of its capital in eligible investment assets** - an ELTIF will only be able to invest in unlisted companies needing long-term capital, real assets that need long-term capital to develop them, and funds regulated under the European Venture Capital Funds Regulation) (EuVECA Regulation) or the European Social Entrepreneurship Funds Regulation (EuSEF Regulation)
- **comply with various requirements regarding investment restrictions, borrowing restrictions, diversification and concentration rules and disclosure**

- not engage in short selling and
- observe strict limitations on its use of leverage and derivatives.

ELTIF managers will be able to make use of an EU-wide passport, subject to a notification procedure established under Articles 31 and 32 of the AIFMD.

In general, ELTIFs will not offer redemption rights before the end of the fund's life – the 'end of life' must be clearly indicated as a specific date in the ELTIF's rules or instruments of incorporation and disclosed to investors.

The Regulation sets out a range of investor protection provisions - in particular, where the ELTIF is to be marketed to retail investors. For example, an ELTIF manager will have to undertake a suitability test to confirm that investment is suitable for the retail investor and to provide him/her with 'appropriate investment advice'. The manager must also ensure that a retail investor with a portfolio of up to EUR 500,000 does not invest more than 10% of his/her portfolio in ELTIFs, provided that the initial amount invested in one or more ELTIFs is not less than EUR 10,000.

Political agreement on the Level 1 text was reached on 26 November 2014 and the Regulation was published in the Official Journal of the EU on 19 May 2015. The Regulation formally entered into force 20 days following publication (i.e., 09 June 2015) and its provisions became effective on **09 December 2015**.

## **Review of the ELTIF Regulation 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 ELTIF Regulation, under which, ESMA would become the single supervisory body for ELTIFs in order to ensure consistent application across all Member States.

Under the ESA Proposal, the ELTIF Regulation would also be amended to grant ESMA the power to conduct investigations and on-site inspections.

Following scrutiny of the ESA Proposals by the EP and the Council, trilogue negotiations started in February 2019 with a view to agreeing a final version of a Regulation and a Directive. Political agreement of a Level 1 text was reached on 21 March 2019, this enables the legislative institution to achieve the Commission's intention to finalise the proposals in time to enter into force 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
<i>Commission Proposal</i>	26 June 2013
<i>Council compromise proposal (1)</i>	20 March 2014
<i>Council compromise proposal (2)</i>	24 April 2014
<i>Council compromise proposal (3)</i>	08 May 2014
<i>Council compromise proposal (4)</i>	23 May 2014
<i>Council compromise proposal (5)</i>	04 June 2014
<i>Council compromise proposal (6)</i>	13 June 2014
<i>European Parliament position</i>	17 April 2014
<i>ECON report</i>	20 March 2014
<i>ECON supplementary report</i>	27 February 2015
<i>Council General Approach</i>	25 June 2014
<i>Political Agreement</i>	26 November 2014
<i>European Parliament adoption</i>	10 March 2015
<i>European Council adoption</i>	20 April 2015
<i>Publication in OJ</i>	19 May 2015
Entry into force	09 June 2015
Effective Date	09 December 2015
<b><u>ESA Proposal</u></b>	
Commission <i>ESA Proposal</i>	<b>20 September 2017</b>

Table 2: Development of Level 2 measures

On 31 July 2015, ESMA issued a *consultation paper* setting out its proposed Level 2 measures. The consultation closed on 14 October 2015.

On 08 June 2016, ESMA submitted a *Final Report* to the European Commission including its draft advice on Level 2 measures other than those under Article 25.

On 04 December 2017, the European Commission adopted a *draft Delegated Regulation* setting out proposed Level 2 measures other than those under Article 25. The *Delegated Regulation* was published in final form in the Official Journal on 23 March 2018.



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## Review of the Regulation on European Long-Term Investment Funds (ELTIF) 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).

On 12 September 2018, the Commission adopted an *amended proposal* and a *proposal for a Directive*. Between them, these would extend the ESA reforms to MLD4, MiFID/MiFIR and Solvency II.

As part of the ESA Proposals, the Commission put forward changes to ELTIF, which would give ESMA responsibility for the authorisation (or registration) and supervision of EuVEECAs, EuSEFs and ELTIFs.

Under the ESA proposals, the Regulations would also be amended to grant ESMA the power to conduct investigations, on-site inspections and to impose penalties or periodic penalty payments. ESMA would be empowered to delegate certain functions back to the national competent authorities where needed and required.

The ESA Proposals are now subject to scrutiny by the EP and the Council – each has now determined what amendments it wishes to see to the Commission's text. With the negotiating positions now decided, the EP and the Council will commence trilogue negotiations in February 2019 with a view to agreeing a final version of a Regulation and a Directive. It is the Commission's intention that these are finalised in time to enter into force before the European Parliamentary elections in May 2019.

# Annex

## Level 2 Measures

The Level 1 text of the ELTIF Regulation requires ESMA to develop specific Level 2 measures, in the form of draft regulatory technical standards (RTS), in five areas.

These are:

- the use of derivatives to hedge risks (**Article 9(2)**)
- aligning the life of an ELTIF and the life-cycle of its assets (**Article 18(3)**)
- assessment of market for buyers and valuing ELTIF assets to be divested (**Article 21**)
- disclosure of costs in the prospectus (**Article 25**) and
- provision of local facilities to enable investors to subscribe and redeem and for making information available (**Article 26**).

Although ESMA's deadline for submitting its draft RTS to the European Commission was **09 September 2015**, its *consultation* on these measures did not close until **14 October 2015**. ESMA's *Final Report*, containing its draft advice to the European Commission was published on **08 June 2016**.

On **04 December 2017**, the European Commission adopted a *draft Delegated Regulation* setting out proposed Level 2 measures except for those required under Article 25. The *Delegated Regulation* was published in final form in the Official Journal on **23 March 2018**.

ESMA will continue to develop Level 2 measures under Article 25. These had been postponed "to ensure their consistency with the legal requirements for key information documents for packaged retail and insurance-based investment products" under the PRIIPs Regulation.

Looking at each of the required measures in turn:

### (a) The use of derivatives to hedge risks – Article 9(2)(d)

#### (i) What does Level 1 say?

Article 9(2) of the Regulation states that:

"An ELTIF shall not undertake any of the following activities:

....

- (d) using financial derivative instruments, except where the use of such instruments solely serves the purpose of hedging the risks inherent to other investments of the ELTIF."

#### (ii) What is ESMA's mandate?

To ensure consistent application of **Article 9(2)(d)**, ESMA is mandated to conduct a public consultation and then develop **draft RTS** which specify "the criteria for establishing the circumstances in which the use of financial derivative instruments solely serves the purpose of hedging the risks inherent to the investments referred to in point (d) of paragraph 2".

#### (iii) Timing

On **31 July 2015**, ESMA issued a *consultation paper* setting out its proposed Level 2 measures. The consultation closed on **14 October 2015**.

On **08 June 2016**, ESMA submitted a *Final Report* to the European Commission including its draft advice on Level 2 measures.

On **04 December 2017**, the European Commission adopted a *draft Delegated Regulation* setting out proposed Level 2 measures. The *Delegated Regulation* was published in final form in the Official Journal on **23 March 2018**.

## (b) Aligning the life of an ELTIF and the life-cycle of its assets - Article 18(3)

### (i) What does Level 1 say?

Article 18(3) of the Regulation states that:

“The life of an ELTIF shall be consistent with the long-term nature of the ELTIF and shall be sufficient in length to cover the life-cycle of each of the individual assets of the ELTIF, measured according to the illiquidity profile and economic life-cycle of the asset and the stated investment objective of the ELTIF.”

### (ii) What is ESMA’s mandate?

ESMA is mandated to develop *draft RTS* which specify “the circumstances in which the life of an ELTIF is considered sufficient in length to cover the life-cycle of each of the individual assets of the ELTIF, as referred to in paragraph 3”.

### (iii) Timing

On **31 July 2015**, ESMA issued a *consultation paper* setting out its proposed Level 2 measures. The consultation closed on **14 October 2015**.

On **08 June 2016**, ESMA submitted a *Final Report* to the European Commission including its draft advice on Level 2 measures.

On **04 December 2017**, the European Commission adopted a *draft Delegated Regulation* setting out proposed Level 2 measures. The *Delegated Regulation* was published in final form in the Official Journal on **23 March 2018**.

## (c) Assessment of market for buyers and valuing ELTIF assets to be divested - Article 21

### (i) What does Level 1 say?

Articles 21(1) and (2) of the Regulation state that:

- “1. An ELTIF shall adopt an itemised schedule for the orderly disposal of its assets in order to redeem investors’ units or shares after the end of the life of the ELTIF, and shall disclose this to the competent authority of the ELTIF at the latest one year before the date of the end of the life of the ELTIF.
2. The schedule referred to in paragraph 1 shall include:
  - (a) an assessment of the market for potential buyers
  - (b) ...
  - (c) a valuation of the assets to be divested

(d) ....”

**(ii) ESMA’s mandate**

ESMA is mandated to develop **draft RTS** which specify the “criteria to be used for the assessments in point (a) and the valuation in point (c) of paragraph 2.”

**(iii) Timing**

On **31 July 2015**, ESMA issued a **consultation paper** setting out its proposed Level 2 measures. The consultation closed on **14 October 2015**.

On **08 June 2016**, ESMA submitted a **Final Report** to the European Commission including its draft advice on Level 2 measures.

On **04 December 2017**, the European Commission adopted a **draft Delegated Regulation** setting out proposed Level 2 measures. The **Delegated Regulation** was published in final form in the Official Journal on **23 March 2018**.

**(d) Disclosure of costs in the prospectus - Article 25**

**(i) What does Level 1 say?**

Articles 25(1) and (2) of the Regulation state that:

- “1. The prospectus shall prominently inform investors of the level of the different costs borne directly or indirectly by the investors. The different costs shall be grouped according to the following headings:
- (a) costs of setting up the ELTIF
  - (b) costs related to the acquisition of assets
  - (c) management and performance related fees
  - (d) distribution costs
  - (e) other costs, including administrative, regulatory, depositary, custodial, professional service and audit costs.
2. The prospectus shall disclose an overall ratio of the costs to the capital of the ELTIF.”

**(ii) What is ESMA’s mandate?**

ESMA is mandated to develop **draft RTS** which specify “the common definitions, calculation methodologies and presentation formats of the costs referred to in paragraph 1 and the overall ratio referred to in paragraph 2.”

When developing these draft RTS, ESMA must take into account the regulatory standards referred to in points (a) and (c) of **Article 8(5) of Regulation (EU) No 1286/2014 (the PRIPS Regulation)**.

**(iii) Timing**

On **31 July 2015**, ESMA issued a **consultation paper** setting out its proposed Level 2 measures. The consultation closed on **14 October 2015**.

ESMA has yet to submit draft Level 2 measures to the Commission under Article 25. ESMA has agreed with the Commission that these draft measures should be postponed to enable ESMA to take into account the work being carried out on cost disclosures for the key information documents under the PRIIPs Regulation.

**(e) Provision of local facilities to enable investors to subscribe and redeem and for making information available - Article 26**

**(i) What does Level 1 say?**

Article 26(1) of the Regulation states:

“The manager of an ELTIF the units or shares of which are intended to be marketed to retail investors shall, in each Member State where it intends to market such units or shares, put in place facilities available for making subscriptions, making payments to unit- or shareholders, repurchasing or redeeming units or shares and making available the information which the ELTIF and the manager of the ELTIF are required to provide.”

**(ii) What is ESMA’s mandate?**

ESMA is mandated to develop **draft RTS** which specify “the types and characteristics of the facilities referred to in paragraph 1, their technical infrastructure and the content of their tasks in respect of the retail investors”.

**(iii) Timing**

On **31 July 2015**, ESMA issued a **consultation paper** setting out its proposed Level 2 measures. The consultation closed on **14 October 2015**.

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