

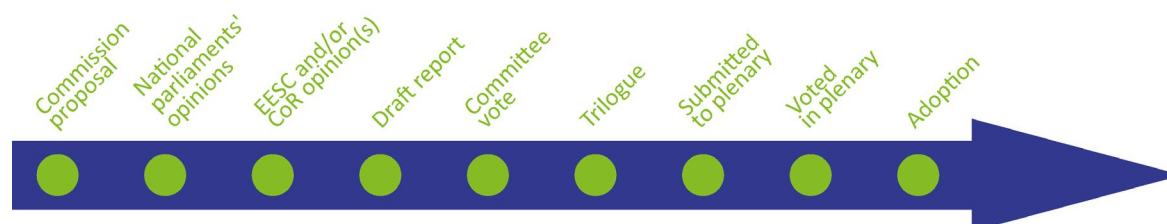
# Cross-border distribution of investment funds

## OVERVIEW

Investment funds are products created to pool investors' capital and to invest it in a collective portfolio of securities. The characteristics of a range of different types of investment funds have been established in Union law, and most funds on the market are categorised as one of these types. The market in the EU is smaller than in the United States, despite there being far more funds in the EU. This is why the European Commission put forward two legislative proposals: one for a regulation aligning national requirements for marketing funds and regulatory fees and harmonising the process and requirements for the verification of marketing material by national competent authorities, and the other for a directive harmonising the conditions under which investment funds may exit a national market and allowing European asset managers to engage in pre-marketing activities. Parliament and Council approved the texts agreed in trilogue on 16 April and 14 June 2019 respectively. The final acts were published on 12 July 2019. The directive's provisions shall apply from 2 August 2021, and the regulation's from August 2019, with some exceptions.

**Proposal for a directive of the European Parliament and of the Council amending Directives 2009/65/EC and 2011/61/EU regarding cross-border distribution of collective investment funds; Proposal for a regulation of the European Parliament and of the Council on facilitating cross-border distribution of collective investment funds and amending Regulations (EU) No 345/2013 and (EU) No 346/2013**

|                               |   |  |
|-------------------------------|---|--|
| <i>Committee responsible:</i> | Economic and Monetary Affairs (ECON)  | COM(2018) 92   |
| <i>Rapporteur:</i>            | Wolf Klinz (ALDE, Germany)  | COM(2018) 110  |
| <i>Shadow rapporteurs:</i>    | Alain Lamassoure (EPP, France)  | 12.3.2018  |
|                               | Mady Delvaux (S&D, Luxembourg)  | 2018/0041 (COD)  |
|                               | Syed Kamall (ECR, UK)   | 2018/0045 (COD)  |
|                               | Matt Carthy (GUE/NGL, Ireland)  | Ordinary legislative procedure (COD)                               |
|                               | Sven Giegold (Greens/EFA, Germany)  | (Parliament and Council on equal footing – formerly 'co-decision') |
| <i>Procedure completed.</i>   | <a href="#">Directive (EU) 2019/1160</a><br>OJ L 188 ,12.7.2019, pp. 106-115. |  |
|                               | <a href="#">Regulation (EU) 2019/1156</a><br>OJ L 188, 12.7.2019, pp. 55-66.  |  |



## Introduction

[Investment funds](#) are investment products created with the sole purpose of gathering funds from investors and investing those funds collectively through a diversified portfolio of financial instruments such as stocks, bonds and other securities. In the EU, investment funds can be categorised as undertakings for collective investment in transferable securities ([UCITS](#)) and alternative investment funds ([AIFs](#)) managed by alternative investment fund managers. UCITS are covered by Directive 2009/65/EC and AIFs are covered by Directive 2011/61/EU. Directive 2011/61/EU is complemented by four fund frameworks:

- [Regulation \(EU\) 345/2013](#) on European Venture Capital funds (EuVECA),<sup>1</sup>
- [Regulation \(EU\) 346/2013](#) on European social entrepreneurship funds (EuSEF). Both the aforementioned regulations were amended by [Regulation \(EU\) 2017/1991](#).
- [Regulation 2015/760](#) on European long-term investment funds (ELTIF)<sup>2</sup> and
- [Regulation 2017/1131](#) on money market funds (MMF).<sup>3</sup>

These rules share the aims of protecting investors and making cross-border distribution easier.

## Existing situation

The current EU legislative framework provides banks and financial service companies established and authorised in one EU country with the possibility to open branches or provide certain services in other EU Member States, with a few authorisation requirements ('passporting').<sup>4</sup> Despite the existence of the passporting regime and the rapid growth of EU investment funds (with a total of €14 310 billion in assets under management in June 2017), the EU investment fund market is still predominantly organised as national markets: according to the European Commission, 70 % of all assets under management are held by investment funds registered for sale in their domestic market only. Only 37 % of UCITS and about 3 % of AIFs are registered for sale in more than three Member States. Compared with the USA, the EU market is smaller in terms of assets under management. In addition, while there are considerably more funds in the EU (58 125 in the EU compared with 15 415 in the USA), they are on average smaller. This has a negative impact on economies of scale, the fees paid by investors and the way in which the internal market operates for investment funds.

## Parliament's starting position

The Parliament had not called for specific action in this area in the past.

## Preparation of the proposal

This proposal, which was already mentioned in the [action plan](#) on building a capital markets union and its [mid-term review](#), was scheduled in the [Commission's 2018 work programme](#). It aims to help address fragmentation in the capital markets, by removing regulatory barriers to the financing of the economy and increasing the supply of capital to businesses.

In the explanatory memorandum to its proposal, the Commission notes that regulatory barriers – namely Member States' marketing requirements,<sup>5</sup> regulatory fees,<sup>6</sup> and administrative and notification requirements<sup>7</sup> – represent a significant disincentive to the cross-border distribution of funds. These barriers were identified in response to the [green paper on capital markets union](#), the [call for evidence on the EU regulatory framework for financial services](#) and the [public consultation on the cross-border distribution of funds](#).

The Commission's proposals were accompanied by an [impact assessment](#), of which EPRS prepared an [initial appraisal](#).

## The changes the proposal would bring – the Directive

### Article 1 – amendments to Directive 2009/65/EC (UCITS)

The Commission – in article 1 – [proposes to amend](#) the following articles of the [UCITS Directive](#).

- In Article 17, it would delete paragraph 10, which empowers the European Securities and Markets Authority (ESMA) to develop draft regulatory technical standards (RTS); and insert a (new) paragraph 8a. According to this new paragraph, if – as a result of the change of any particulars referred to in paragraph 8 – the UCITS no longer complied with this directive, the relevant national competent authorities (NCAs) of paragraph 8 would inform the [management company](#) within 10 working days that it would not implement that change. If, despite the notification, the change was implemented, then the NCAs of the home Member State of the UCITS would take all necessary measures in accordance with Article 98 of the UCITS Directive (supervisory and investigatory powers). If, however, the change did not affect compliance of the management company with this directive, the NCAs of the home Member State of the company would inform the competent NCAs of the host Member State of the company of those changes, within 10 working days.
- Article 77 – on marketing communications to investors – would be entirely deleted.<sup>8</sup>
- In Article 91, it would delete paragraph 3, which requires Member States to ensure that their national regulations governing cross-border marketing of UCITS within their territories are easily accessible from a distance, by electronic means and in a language customary in the sphere of international finance.<sup>9</sup>
- Article 92 would be replaced with an article that would specify the tasks to be performed by the facilities established in each Member State by the UCITS management company<sup>10</sup> and add that Member States would not require the UCITS management company to have a physical presence for those tasks.
- In Article 93 (proposal from a UCITS to market its units in a Member State other than its home Member State), the proposal would replace paragraph 8. If the information in the notification letter of Article 93(1) changes or if share classes to be marketed change, the UCITS would notify the home Member State NCAs in writing at least a month before implementing the change. Similarly to the amendment in Article 17, if by implementing this change the UCITS no longer complied with the directive, the relevant NCAs would notify it, within 10 working days, not to implement it. If, despite this, the UCITS implemented the change, the home Member State NCAs would take all necessary measures in accordance with Article 98 of the UCITS Directive (supervisory and investigatory powers). If, however, the change did not affect the compliance of the UCITS with the directive, then the home Member State NCAs would inform the host Member State NCAs without undue delay of those changes.
- A new article 93a would be added, to complement the notification procedures with the conditions for UCITS that decide to stop their marketing activities in a Member State. These conditions would be: (i) a maximum of 10 investors who hold up to 1 % of assets under management of this UCITS having invested in this UCITS in an identified Member State; (ii) a blanket offer to repurchase all its UCITS units by investors in that Member State would be made public for at least 30 working days and would be addressed individually to all investors in the host Member State whose identity was known; (iii) the intention to stop the marketing activities in the Member State would be made public by means of a publicly available medium, which would be customary for marketing UCITS. The UCITS would further submit a notification letter to the competent authority of its home Member State, comprising the previous information. The NCAs of the UCITS home Member State would transmit the notification letter within 20 working days of receipt to ESMA and to the competent authorities of the Member State where the marketing would be discontinued. They would further inform the UCITS of that transmission. As of that date,

the UCITS would cease all marketing of its units in the Member State identified in the notification letter. It would continue, however, supplying the necessary information (articles 68 to 82 and 94) to investors who remain invested in it.

- Article 95(2), which empowers ESMA to develop draft RTS to determine the form and contents of the standard model of a notification letter to be used for the aforementioned notification, would be deleted.

## Article 2 – amendments to Directive 2011/61/EU (AIFMD)

With regard to the Alternative Investment Fund Managers (AIFM) Directive (AIFMD), the Commission proposes, in article 2 of the proposal, to amend the following articles.

- In Article 4(1), on definitions, the proposal would insert the definition of 'pre-marketing', i.e. 'a direct or indirect provision of information on investment strategies or investment ideas' by the AIFM or on their behalf 'to professional investors domiciled or registered in the Union in order to test their interest in an AIF which is not yet established'.
- The proposal would introduce a new article 30a relative to the conditions under which an AIFM could engage in pre-marketing activities in the Union.
- Article 31(5), which empowers ESMA to draft implementing technical standards to determine the form of a model for the notification letter and the form of the written notice (both referred to in the article), would be deleted.
- Article 32 would be amended to reflect more specifically what 'without undue delay' refers to in the second and fourth subparagraphs of paragraph 7 ('20 working days' and 'one month' respectively). In addition, paragraph 8 – which empowers ESMA to develop draft ITS – would be deleted.
- A new article 32(a) would be inserted, dealing with the issue of the discontinuation of marketing of units or shares of EU AIFs in the Member States other than in the home Member State of the AIFM. Similarly to the aforementioned new article 93a in UCITS, an AIFM would be authorised to de-notify<sup>11</sup> the marketing of an EU AIF it manages only if there would be a maximum of 10 investors holding up to 1% of assets under management of this AIF in an identified Member State. The AIFM would notify the competent authorities of its home Member State of how it fulfilled the conditions for de-notification and for a public notice of the de-notification. The AIFM would also notify the authorities of the offers presented to the investors to repurchase units and shares of the AIF that was no longer going to be marketed in their Member State. All transparency requirements that investors must fulfil pursuant to Directive 2011/61/EU would continue to apply to investors who would retain their investment after de-notification of the marketing activities in the selected Member State.
- Article 43a would be inserted in Directive 2011/61/EU to ensure consistent treatment of retail investors, regardless of the type of fund in which they decided to invest. Where Member States allow AIFMs to market units or shares of AIFs in their territories to retail investors, these AIFMs would also make facilities available to retail investors to serve situations such as making subscriptions, making payments or repurchasing or redeeming units. For this purpose, AIFMs would be able to use electronic or other means of distance communication.

## The changes the proposal would bring – the regulation

Article 1 of the [proposed regulation](#) would introduce the definitions and links to UCITS and AIFMD.

Article 2 would set the requirements for marketing communications, namely (i) the communications would be identifiable as such; (ii) they would present the risks and rewards of purchasing units or shares of AIFs and UCITS in an equally prominent manner; and (iii) all information included in marketing communications would be fair, clear and not misleading. UCITS management companies would make sure that no marketing communication that contained specific information about a

UCITS contradicted – or diminished the significance of – the information contained in the prospectus (Article 68 of the UCITS Directive) and the key investor information (Article 78 of the UCITS Directive). Similarly, AIFMs would ensure that no marketing communication compromising an invitation to purchase units or shares of an AIF that contained specific information about an AIF made any statement that contradicted – or diminished the significance of – the information that needed to be disclosed to investors (Article 23 of AIFMD).

Articles 3 (publication of national provisions concerning marketing requirements) and 4 (ESMA central database on national provisions concerning marketing requirements) would introduce a transparency framework for national provisions on marketing requirements. According to these articles, NCAs would publish online – and notify ESMA about – all applicable national laws, regulations and administrative provisions governing marketing rules for AIFs and UCITS, and their summaries, in at least a language customary in the sphere of international finance. To streamline the information flows between the competent authorities and ESMA, article 3 would provide for the power to implement technical standards, and to determine standard forms, templates and procedures for the notifications. As for ESMA, within one month of the entry into force of the regulation, it would have to publish and maintain on its website a central database containing the national laws, regulations and administrative provisions concerning marketing requirements, and the summaries thereof, and the hyperlinks to the websites of competent authorities.

Where NCAs require systematic notification of marketing communications that the UCITS management companies intend to use in their dealings with investors to verify compliance of such communications with relevant national provisions on marketing requirements, they would inform the UCITS management company within 10 working days of the need to amend its marketing communications. Furthermore, they would establish, apply and publish applicable procedures ensuring transparent and non-discriminatory treatment regardless of the origin of the verified investment fund. By 31 March of each year, the NCAs would inform ESMA of the decisions rejecting or requesting adaptations to marketing communications.

Article 6 would provide that, where the competent authority levied fees or charges, they would be proportionate to supervisory tasks carried out, and the relevant invoices – which would indicate the fees/charges, the means of the payment and the date when it was due – would be sent to the registered offices of the AIFMs or UCITS management companies.

Article 7 would require the competent authorities to publish and maintain on their websites in at least a language customary in the sphere of international finance, central databases on the fees or charges mentioned in the previous article, or – where applicable – relevant calculation methodologies. The NCAs would further notify ESMA of those levels and methodologies. The article would empower ESMA to develop implementing technical standards to determine standard forms, templates and procedures for the notifications, to streamline the information flows between ESMA and the NCAs.

Article 8 would entrust ESMA with the task of publishing and maintaining online an interactive database with the fees or charges charged by the competent authorities, or, where applicable, with the calculation methodologies used. Article 9 would provide further that, as part of this database, ESMA would develop, make available and maintain on its website a publicly accessible interactive tool on fees and charges.

ESMA would also be required to publish and maintain on its website a central database on all AIFMs, UCITS management companies, AIFs and UCITS, as well as the Member States where those funds were marketed (article 10).

Article 11 would require NCAs to transmit the notifications and notification letters referred to in the previous article to ESMA. To standardise and streamline the information flows between investment funds/AIFMs or UCITS management companies and the NCAs, as well as between NCAs and ESMA, this article would empower ESMA to develop draft regulatory and implementing technical standards.

Articles 12 and 13 would amend Regulation (EU) No 345/2013 (Venture Capital Funds) and Regulation (EU) No 346/2013 (Social Entrepreneurship Funds), to add the concept of pre-marketing in those regulations and allow managers of qualifying EuVECA or EUSEF funds to engage in pre-marketing in the EU.

Finally, Article 14 would provide that at most five years after the date of entry into force of the regulation, the Commission would conduct an evaluation of its application, on the basis of a public consultation and of discussions with ESMA and the NCAs.

## Advisory committees

The European Economic and Social Committee (EESC), adopted its [opinion](#) on both proposals on 11 July 2018. The EESC is of the view that the main reason for the existing barriers to the cross-border distribution of investment funds stems from the lack of instructions from the European Securities and Markets Authority (ESMA) – as a result of which each national jurisdiction has different rules – and not with the current regulations. In this context, it stresses the need for more harmonisation so as to obtain clear national provisions that are consistent throughout the EU. It welcomes and supports the intention to improve transparency regarding regulatory fees, as well as the creation of the ESMA database listing AIFMs, UCITS management companies, AIFs and UCITS, but notes that this last measure should not involve the imposition of additional notification requirements on asset managers. It also notes that the decision on termination of the proposed rules for discontinuing promotion and marketing of investment funds should be optional and depend on the decision of the asset manager. Lastly, it recommends that more detailed rules be established to ensure the verification of qualifications and competence of persons providing investment services.

## National parliaments

None of the 18 parliamentary chambers from 16 Member States that scrutinised the proposals raised subsidiarity concerns by the deadline of 11 May 2018, on either the proposed [directive](#) or [regulation](#).

## Stakeholder views

No major views have been expressed on the subject since the publication of the proposals.

## Legislative process

In Parliament, the proposals were assigned to the Economic and Monetary Affairs Committee (rapporteur: Wolf Klinz, ALDE, Germany). The committee adopted its report on the proposals for a regulation and a directive on 3 December 2018. The committee's decisions to enter trilogue negotiations were confirmed by plenary on 12 December.

## European Parliament – proposal for a directive

The [Parliament's position](#) would amend the proposal for a directive in the following main areas:

According to the proposed amendment to Article 92, the UCITS management company would have to offer, in each Member State where it intends to market units of a UCITS, facilities to make available to investors the UCITS prospectus and the up-to-date UCITS key investor information document.<sup>12</sup>

Parliament also proposes to increase the period the NCAs have to notify a UCITS that it does not comply with the directive, from 10 to 15 days (amendment to article 93(8)).

In the case of de-notification of marketing activities of units of a UCITS, the notice to investors would have to state the consequences if they do not accept the offer to repurchase their units (article 93a).

Parliament proposed to amend article 30a of AIFMD (conditions for pre-marketing in the EU by an EU AIFM) adding that:

- Member States would have to ensure that EU AIFMs make appropriate arrangements in order for the information relating to their pre-marketing activities to be available, and provided upon request to their home Member State authorities, as well as to the authorities of the Member States in which they have engaged in pre-marketing activities;
- EU AIFMs would have to ensure that their pre-marketing activities are adequately documented; this includes references to the Member States and the periods of time in which the pre-marketing activities took place, as well as a brief description of those activities, including the information on the investment strategies presented and, where relevant, a list of the AIFs and compartments of AIFs presented;
- Third parties would only be able to engage in pre-marketing activities in a host Member State of an AIFM on behalf of an authorised EU AIFM, if they have been authorised as [investment firms](#), as [credit institutions](#), as a [UCITS management companies](#), as [alternative investment fund managers](#), or if they act as a tied agent.

The information provided by the UCITS/AIF would have to be provided in the official language of the Member State, one of its official languages, or a language approved by its competent authorities (amendment to article 93a of UCITS and to article 43a of AIFMD).

Also, according to amended articles 93a of UCITS and 32a of AIFMD, as long as investors remained invested in the UCITS/AIFM after marketing is discontinued, the home Member State authorities would have to provide the authorities of the Member State where the marketing had been discontinued with the information required under Article 93.

In addition, the authorities of the Member State where the marketing had been discontinued would have to exercise the rights and obligations conferred on competent authorities of the UCITS/AIFM host Member State under [Articles 97 and 108 of UCITS/45 of AIFMD] and, if applicable, could levy fees or charges for carrying out those activities (proposed new articles 93a of UCITS/32a of AIFMD).

Parliament also proposed to amend article 33(6) to add that the relevant home Member State authorities have 15 working days to inform the AIF manager not to implement changes.

Lastly, it proposed to amend article 4 (evaluation), providing that the Commission should submit a legislative proposal to Parliament and Council amending the UCITS Directive, to harmonise its pre-marketing provisions with the definition and conditions of pre-marketing laid down in AIFMD.

## European Parliament – proposal for a regulation

The [Parliament position](#) would amend the proposal for a regulation in the following main points:

EuVECA and EuSEF managers would be included among those responsible to ensure the fulfilment of requirements for marketing communications (article 2).

According to a new point (2a) in article 2, marketing communications would also have to specify where, how and in which language investors or potential investors can obtain a summary of investor rights. They would also have to provide a hyperlink to such a summary, which includes access to EU level and national collective redress mechanisms in the event of litigation.

According to amended article 5, competent authorities could decide to require prior notification of marketing communications in order to verify ex-ante the compliance of those communications with the regulation. In point 4 of the same article, Parliament would add that every two years after the entry into force of the regulation, authorities must report specific additional information to ESMA.

Article 6 would stipulate that fees or charges levied by a competent authority in carrying out its duties in relation to the cross-border activity of AIF, EuVECA or EuSEF managers and UCITS management companies must be consistent with the actual related costs incurred by it.

Parliament would amend the proposed article 10 on the ESMA central database (adding that it is for the cross-border marketing of AIFs and UCITS) to specify what this database must list on its website and that it must be kept up to date.

In article 11, Parliament would add that ESMA must establish a system for the regular exchange of information relevant to cross-border marketing activities of AIFMs and UCITS management companies, so as to facilitate the exchange of information between it and competent authorities. In this context, it must also establish a notification portal into which each competent authority will upload (and transfer/receive) the necessary documents mentioned in the article.

In addition, new article 11a would provide that, in order to enable the competent authorities to exercise the functions attributed to them in the regulation, Member States must provide them with sufficient resources and all the necessary supervisory and investigative powers.

With regard to the Commission's proposed amendments to Regulations (EU) No 345/2013 (EuVECA) and No 346/2013 (EuSEF), Parliament would amend article 4a (in both cases) to add – among other things – that: when draft prospectuses or other offering documents are provided, they should state clearly that they do not constitute an offer or an invitation to subscribe to units or shares; before managers of EuVECA and EuSEF engage in pre-marketing activities in another Member State(s), they must inform the competent authorities of the home Member State and the Member States where the pre-marketing activity is carried out via a simple, informal letter; managers of EuVECA and EuSEF must ensure that investors do not acquire units or shares in such funds through pre-marketing activities, but only under marketing permitted in articles 14, 14a or 15; and Member States must ensure that EuVECA/EuSEF managers make appropriate arrangements to ensure that marketing activities are adequately documented and that related information relative to those activities is available and provided upon request to the competent authorities of the home Member State and of those Member States where the pre-marketing activities took place.

Lastly, to assess the phenomenon of reverse solicitation<sup>13</sup> and demand on the own initiative of an investor, as well as the potential to use them to circumvent provisions connected to the passport (including by third-country entities), the Commission would have to publish a report on these issues two years after the entry into force of the regulation (proposed article 14).

In the Council, both proposals were examined by the Working Party on Financial Services in several meetings under the Bulgarian Presidency. The Council adopted its negotiating mandate on 20 June 2018. The main changes proposed by the Council are the following:

## Council – proposal for a directive

On the [proposal for a directive](#), Council would add a new subparagraph to article 93(1) (notification letter to the competent authority if marketing is discontinued) under which, the notification letter would have to include information and the address necessary for the invoicing or communication of any applicable regulatory fees or charges by the NCAs of the home Member State.

Similarly to the Parliament's proposal, it would increase the period the NCAs have to notify a UCITS that does not comply with the directive, from 10 to 15 days (amendment to article 93(8)).

In the proposed new article 93a, Council proposed that the competent authorities of the home Member State ensure that the UCITS does not de-notify its activities. It would further increase the number of investors domiciled or with a registered office, to no more than 50 (93a(1a)).

In article 30a, Council would add that, when a prospectus or offer documents are provided, it must be stated that those documents do not constitute an offer or invitation to subscribe and that the information provided should not be relied upon because it is incomplete and may change. It would also modify article 30a(3), so that AIF managers ensure that investors do not acquire units or shares in an AIF through pre-marketing activities. In addition, it would add the obligation for the AIF manager to ensure that its pre-marketing activity is adequately documented, available and provided upon request to its competent authorities.

Council would amend the proposed article 32a(1a), so that the conditions apply to investors that hold less than 5 % of assets (instead of less than 1 %).



Lastly, in article 33 it would amend point 6 to add that the relevant competent authorities of the home Member State have 15 working days to inform the AIF manager not to implement changes.

## Council – proposal for a regulation

On the [proposal for a regulation](#), Council would include EuVECA and EuSEF managers in those responsible for ensuring the fulfilment of requirements for marketing communications (article 2). It would add a new article (5a) according to which competent authorities must report specific information on marketing communications to ESMA every two years from the entry into force of the regulation. ESMA, in turn, would have to submit a report to the Commission, presenting an overview of marketing requirements in Member States and analysing the relevant national regulations.

In article 7, relating to the publication of national provisions on fees and charges, Council proposed that competent authorities publish and maintain up-to-date information on their websites.

The interactive database on fees and charges proposed by the Commission (article 8) would be replaced by the obligation for ESMA to maintain, on its website, links to the websites of competent authorities. As a result, proposed article 9 (interactive tool that provides an indicative calculation of fees and charges) would be merged with article 8.

The proposed article 11, relating to the standardisation of notifications to ESMA, is shortened significantly ('the information which is necessary' to create and maintain the central database of article 10).

The Council would add a new article (11a) according to which, competent authorities would have to be provided with all necessary supervisory and investigatory powers necessary to exercise their functions and that those powers would also be exercised with respect to managers referred to in article 2.

With regard to the proposed amendments to Regulations (EU) No 345/2013 (EuVECA) and No 346/2013 (EuSEF), Council would add that, when a prospectus or offering documents are provided, it must be stated that they do not constitute an offer or invitation to subscribe; and that the information provided should not be relied upon because it is incomplete and may change.

A provisional agreement was reached on 5 February 2019. The texts were then approved in the ECON committee on 4 March 2019. The main points on which the agreement amends the Commission proposals are the following.

## Trilogue agreement – proposal for a directive

According to [amended](#) Article 92, the UCITS management company would have to offer, in each Member State where it intends to market units of a UCITS, facilities to make available to investors information and documents required pursuant to chapter IX of the UCITS Directive (including the prospectus and key investor information).

A new subparagraph is added to article 93 (1), according to which, the notification letter a UCITS must submit to the competent authority of the home Member State in case it wants to discontinue marketing its units in a Member State, must also include information and the address necessary for the invoicing or communicating of any applicable regulatory fees or charges by the competent authorities of the host Member State.

The period the national competent authorities have at their disposal to notify a UCITS that does not comply with the directive, increases from 10 to 15 days (amendment to article 93 (8)).

In the case of de-notification of marketing activities of units of a UCITS, the notice to investors has to state clearly the consequences for them if they do not accept the offer to repurchase their units (article 93a).

With regards to the proposed amendments to Directive 2011/61/EU (AIFMD), the definition of 'pre-marketing' provided by the Commission is broadened.

In article 30a (similarly to the proposal for a regulation) it is added that, when a prospectus or offering documents are provided, it must be stated that those documents do not constitute an offer or invitation to subscribe and that the information provided should not be relied upon because it is incomplete and may change.

Member States must ensure that an EU AIF manager sends, within two weeks of starting pre-marketing, an informal letter to the competent authorities of its home Member State (which in turn will promptly inform the competent authorities of the Member States in which the AIFM was engaged in pre-marketing). That letter must contain references to the Member States and the periods of time in which the pre-marketing took place, a brief description of the pre-marketing, including the information on the investment strategies presented and, where relevant, a list of the AIFs and compartments of AIFs which were the subject of pre-marketing. Third parties can only engage in pre-marketing activities on behalf of an authorised EU AIFM if they are authorised as investment firms, as credit institutions, as UCITS management companies, as AIF managers, or if they act as a tied agent (amended article 30a of AIFMD).

Point 6 of article 33 is amended, specifying that the relevant competent authorities of the home Member State have 15 working days to inform the AIF manager to not implement changes.

The information provided by the UCITS/AIF must be provided in the official language of the Member State, one of its official languages, or a language approved by its competent authorities (amendment to article 93a of UCITS and to article 43a of AIFMD).

Lastly, in amended articles 93a of UCITS and 32a of AIFMD, (relative to investors remaining invested in the UCITS/AIFM after marketing is discontinued) the amended text does not include the possibility for competent authorities of the Member State where the marketing had been discontinued to levy fees or charges to exercise the rights and obligations conferred on competent authorities of the UCITS/AIFM host Member State. Furthermore, a provision is added under which, without prejudice to other supervisory powers, the competent authorities may not require the AIFM concerned to demonstrate compliance with national laws, regulations and administrative provisions governing marketing requirements referred to in Article 3 of the Regulation on cross-border distribution of investment funds.

## Trilogue agreement – proposal for a regulation

According to the [agreement](#), EuVECA and EuSEF managers are included in those responsible to ensure that requirements for marketing communications (article 2) are fulfilled.

According to a new point (2a) in article 2, marketing communications have to specify where, how and in which language investors or potential investors can obtain a summary of investor rights. They also have to provide a hyperlink to such a summary, which includes access to EU level and national collective redress mechanisms in the event of litigation. Lastly, they must contain clear information that the manager or management company referred to in paragraph 1 of the article may decide to terminate the arrangements made for the marketing of its collective investment funds.

According to amended article 5, competent authorities can decide to require – on a systematic basis or in accordance with other verification practices – prior notification of marketing communications in order to verify ex-ante the compliance of those communications with the regulation.

New article (5a) requires that competent authorities must report specific information on marketing communications to ESMA every two years after the entry into force of the regulation. ESMA, in turn, must submit a report to the Parliament, Council and the Commission, presenting an overview of marketing requirements in Member States and analysing the national laws, regulations, and administrative provisions governing marketing communications.

Article 6 provides that any fees or charges levied by a competent authority in carrying out its duties in relation to the cross-border activity of AIF, EuVECA or EuSEF managers and UCITS management companies must be consistent with the overall costs incurred by the competent authority for carrying out its functions with respect to these duties.

Amended article 7 relative to the publication of national provisions concerning fees and charges, requires that competent authorities must publish and maintain up to date information on their websites; also, point 3 of the article that was proposed by the Commission and allowed ESMA to develop ITS to determine the (content of the) information to be provided by competent authorities, is deleted.

The interactive database on fees and charges proposed by the Commission (article 8) is deleted. Instead, ESMA has to maintain on its website, links to the websites of competent authorities. As a result, the publicly accessible interactive tool that provides an indicative calculation on fees and charges (originally article 9) is merged with article 8.

Article 10 on the ESMA central database on on AIFMs, UCITS management companies, AIFs and UCITS is amended. The amended article refers to a database on 'cross-border marketing of AIFs and UCITS' and specifies what this database must list on its website, as well as the fact that it must be kept up to date by ESMA. Amended article 11 provides that competent authorities of home Member States must communicate to ESMA the necessary information for the creation and maintenance of the central database referred to in the previous article and that ESMA must establish a notification portal into which each competent authority will upload the necessary documents.

New article 11a stipulates that, to enable the competent authorities to exercise the functions attributed to them in the regulation, Member States must provide them with all necessary supervisory and investigative powers and that those powers would also be exercised with respect to managers referred to in article 2 of the regulation.

With regard to the Commission's proposed amendments to the EuVECA and EuSEF Regulations, article 4a is now amended to add that – among other things – when a prospectus or offering documents are provided, they must state that they (the documents) do not constitute an offer or invitation to subscribe and that the information provided should not be relied upon because it is incomplete and may change; and that managers of EuVECA and EuSEF must ensure that investors do not acquire units or shares in such funds through pre-marketing activities, but only under marketing permitted under article 15.

Lastly, with regard to EuSEF, to assess the phenomenon of reverse solicitation and demand on the own initiative of an investor, as well as the potential to use them to circumvent provisions connected to the passport (including by third country entities), the proposed article 14 is amended to include a point requiring the Commission to publish a report on these issues two years after the entry into force of the regulation.

The European Parliament approved the trilogue agreements in plenary on 16 April 2019 and the Council on 14 June. The final acts were signed on 20 June 2019 and published in the [Official Journal](#) on 12 July 2019. The directive's provisions have to be transposed into national law by, and shall apply from, 2 August 2021. The regulation's provisions apply from August 2019, apart from certain provisions which will apply from 2 August 2021.

## EP SUPPORTING ANALYSIS

Werner H., [Cross-border distribution of investment funds](#), implementation appraisal, EPRS, European Parliament.

## OTHER SOURCES

Cross-border distribution of collective investment funds: [pre-marketing and de-notification](#) and [marketing and regulatory fees](#), Legislative Observatory (OEIL), European Parliament.

## ENDNOTES

- <sup>1</sup> For more information, see G. Malmersjo, [European venture capital and social enterprise funds](#), implementation appraisal, EPRS, European Parliament, October 2016, and A. Delivorias, [Reviving risk capital: The proposal to amend EuVECA and EuSEF](#), EU Legislation in progress briefing, EPRS, European Parliament, September 2017.
- <sup>2</sup> For a short overview, see A. Delivorias, [European long-term investment funds](#), EPRS, European Parliament, March 2015.
- <sup>3</sup> For more information, see M. Szczepanski, [Money Market Funds: Measures to improve stability and liquidity](#), EU Legislation in progress briefing, EPRS, European Parliament, July 2017.
- <sup>4</sup> For an overview of passporting, see M. Szczepanski, [Understanding equivalence and the single passport in financial services](#), EPRS, European Parliament, February 2017.
- <sup>5</sup> EU funds marketed to investors are usually required to comply with national requirements set by host Member States. These marketing requirements, especially those relating to the content of marketing communications (invitations to purchase those funds), differ across the EU. The European Commission [notes](#), as an example, that some Member States require ex-ante approval of the marketing communications while others monitor the communications ex-post.
- <sup>6</sup> The European Commission notes that to obtain the 'passport', EU investment funds must follow a formal notification process. Regulatory fees are fees applied by national competent authorities to process such notifications. The level of fees levied by host Member State on asset managers can vary considerably.
- <sup>7</sup> The Commission notes, in this respect, that contrary to *initial notification* for such funds, which takes place between national authorities (i.e. without asset managers being involved), a *change in the information* provided to the home Member State national authority obliges asset managers to provide written notice to the host Member State authority.
- <sup>8</sup> The marketing communications requirements are now laid down in the accompanying proposal for a regulation.
- <sup>9</sup> The proposal for a regulation contains specific rules on the transparency of national laws and requirements applicable to marketing communications with respect to all collective investment funds.
- <sup>10</sup> These tasks include processing orders relating to the units of the UCITS, the provision of information on how orders can be made and how repurchase and redemption proceeds are paid.
- <sup>11</sup> When a fund wishes to stop its marketing activity and exit the market of one or several Member States, it must follow a 'de-notification' process. The Commission notes that different procedures apply across Member States depending on whether there are still local investors in the fund and on whether their number drops below a specific threshold.
- <sup>12</sup> For more information on KIID, see Article 78 of [Directive 2009/65/EC](#) and Commission [Regulation \(EU\) No 583/2010](#)
- <sup>13</sup> According to the Commission impact assessment, reverse solicitation is 'where an prospective investor contacts a management company on his/her own initiative, seeking to purchase units of shares of a fund without having been first marketed to by that company'.

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