K law
advocaten – avocats – attorneys

European Parliament endorses legislative package on the cross-border distribution of collective investment funds

Introduction

On 16 April 2019 the European Parliament endorsed a legislative package presented by the European Commission in March 2018 concerning the cross-border distribution of collective investment funds comprising of:

- a proposed Directive amending Directive 2009/65/EC (**UCITS-D**) and Directive 2011/61/EU (**AIFMD**); and
- a proposed Regulation on facilitating cross-border distribution of collective investment funds and amending Regulation (EU) No 345/2013 on European venture capital funds (**EuVECA Regulation**) and Regulation (EU) No 346/2013 on European social entrepreneurship funds (**EuSEF Regulation**).

The texts adopted by the European Parliament introduce some amendments to the European Commission's initial proposals and have been sent to the Council for formal adoption, signature and publication in the Official Journal of the EU[1].

Aim of the legislative package

This legislation is aimed at supporting the establishment of a Capital Markets Union by, amongst others, reducing regulatory barriers to the cross-border distribution of investment funds while ensuring investors' protection. In order to create a level playing field, the legislative package addresses both UCITS management companies (which also covers internally managed UCITS) and AIFMs (including EuVECA managers and EuSEF managers).

Key takeaways of the legislative package

1. Pre-marketing

A harmonized definition of pre-marketing and a set of harmonized conditions under which an authorised EU AIFM can engage in pre-marketing activities to potential professional investors is being introduced in the AIFMD.

Under the new rules:

- pre-marketing is **defined** as the (in)direct provision of information or communication on investment strategies or investment ideas by an EU AIFM (or on its behalf) to potential professional investors in order to test their interest in an AIF (or a compartment), and which does not amount to an offer or placement to the potential investor to invest in the units or shares of that AIF or compartment.
- pre-marketing can relate to both AIFs which are **not yet established** and AIFs which are established but are **not yet notified** for marketing in accordance with article 31 or 32 AIFMD.
- pre-marketing can take place in the Union **without a marketing notification** in accordance with article 31 or 32 AIFMD except where the information presented to potential professional investors: (i) is sufficient to allow investors to commit to acquiring units or shares of a particular AIF; (ii) amounts to subscription forms or similar documents whether in a draft or a final form; or (iii) amounts to constitutional documents, a prospectus or offering documents of a not yet established AIF in a final[2] form.
- EU AIFMs must ensure (i) that investors do not acquire units or shares in an AIF through pre-marketing and (ii) that investors contacted as part of pre-marketing may only acquire units or shares in that AIF through marketing permitted under article 31 or 32 AIFMD. Moreover, any subscription by professional investors to units or shares of an AIF within 18 months after the EU AIFM began pre-marketing activities for such an AIF, shall be considered to be the **result of marketing** and will require a marketing notification in accordance with article 31 or 32 AIFMD (thus seeming to exclude the possibility for managers to rely on a 'reverse solicitation' exemption with respect to such AIF).
- EU AIFMs will be required to, within 2 weeks of having begun pre-marketing, submit an **informal letter** describing the pre-marketing activities to the competent authorities of their home Member State (which will in

[1] The procedure files of both texts can be found on the European Parliament's website (see: proposed Directive and proposed Regulation).
[2] Where a *draft* prospectus or offering document is provided, it may not contain information sufficient to allow investors to take an investment decision and must clearly state that: (i) it does not constitute an offer or an invitation to subscribe to units or shares of an AIF; and (ii) the information presented therein should not be relied upon because it is incomplete and may be subject to change.

turn inform the competent authorities of the Member States where pre-marketing is taking or has taken place) to ensure that national competent authorities can exercise their control over pre-marketing activities.

- a **third party** will only be allowed to engage in pre-marketing on behalf of an EU AIFM where it is itself authorised as a MiFID investment firm, a credit institution, a UCITS ManCo, an AIFM or acts as a tied agent.
- EU AIFMs have to ensure that pre-marketing is **adequately documented**[3].

In order to ensure a level playing field between **EuVECAs** or **EuSEFs** on the one hand and (other) AIFs on the other hand, identical rules on pre-marketing are being introduced in the EuVECA Regulation and the EuSEF Regulation.

Finally, it was also discussed during the legislative process to instruct the European Commission to submit a legislative proposal amending the UCITS-D, to harmonise its pre-marketing provisions with the definition and conditions of pre-marketing laid down in the AIFMD. However, such instruction did not make it into the text as adopted during the European Parliament's plenary session.

2. Marketing materials

Harmonized rules are being introduced for marketing materials issued by AIFMs[4] and UCITS management companies which provide amongst others that marketing communications[5]:

- must be **identifiable** as such.
- must describe the **risks and rewards** of purchasing units or shares of an AIF or units of a UCITS in an equally prominent manner.
- are **fair, clear and not misleading**.
- specify where, how and in which language (potential) investors can obtain a **summary of investor rights** and contain clear information that the manager may decide to terminate the arrangements made for the marketing (**de-notification**)[6].

These new harmonized rules on marketing materials seem to apply to all types of investors (retail and professional) and all types of AIFMs (also registered or 'small' AIFMs and even non-EEA AIFMs).

In addition, UCITS management companies must ensure that[7]:

- marketing communications that contain *specific* information about a UCITS do not contradict or diminish the significance of the information contained in the prospectus or the KIID.
- *all* marketing communications indicate that (i) a prospectus exists and that the KIID is available and (ii) specify where, how and in which language (potential) investors can obtain the prospectus and the KIID (also providing hyperlinks to or website addresses for those documents).

Finally, national competent authorities are given the faculty to require **prior notification** of marketing communications by UCITS management companies and AIFMs[8] (insofar the latter intend to market to retail investors). Such prior notification:

- may never constitute a prior condition for marketing.
- may only be required for the sole purpose of ex ante verification of compliance with the marketing requirements (including any national marketing requirements).
- must be subject to procedures which are established, being applied and are published on the competent authorities' websites (ensuring transparent and non discriminatory treatment regardless of the origin of the fund).
- must be responded to by competent authorities within 10 business days.

Nevertheless, the **impact for AIFMs and UCITS management companies marketing into Belgium** will in practice be limited because of the Belgian Royal Decree of 25 April 2014 creating certain information obligations in the context of the marketing of financial instruments to retail clients (the **"Advertising Royal Decree"**). The Advertising Royal Decree already provides that advertising materials addressed to retail clients (i) must meet certain qualitative and content criteria and (ii) must be submitted to the FSMA for prior approval in the form in which it will be disseminated to retail clients (insofar the materials relate to financial products for which the FSMA must approve a prospectus or a KID).

[3] The Recitals to the proposed Directive as discussed by the Committee on Economic and Monetary Affairs stated that the following information should be included: "*a reference to the Member States and the period of time in which the pre-marketing activities took place and a description of the investment strategies or investment ideas presented in the course of the pre-marketing activities*". However, this clarification was not included in the Recitals of the version adopted by the European Parliament.

[4] Including EuVECA managers or EuESEF managers.

[5] In order to promote good practices of investor protection, ESMA is empowered to issue guidelines on the application of these marketing requirements, taking into account on-line aspects of marketing communications.

[6] Although article 4(3) of the proposed Regulation only (indirectly) refers to marketing communications with respect to UCITS, the recitals state that marketing communications addressed to investors in UCITS *and AIFs* should specify where they can obtain a summary of investor rights and that managers have the right to terminate the arrangements made for marketing.

[7] Please note that similar rules apply with respect to (i) the disclosure obligations of AIFMs, EuVECA managers and EuESEF managers and (ii) AIFs which publish a prospectus.

[8] Including EuVECA managers or EuESEF managers.

3. National marketing provisions

In order to increase transparency, competent authorities must publish and maintain on their websites **up-to-date and complete information on the applicable national laws**, regulations and administrative provisions governing marketing requirements for AIFs and UCITS (including summaries thereof) in at least a language customary in the sphere of international finance. In addition, ESMA is instructed to create a central database containing summaries of national requirements for marketing communications and hyperlinks to the information published on the websites of competent authorities.

4. PRIIPS

In order to avoid investors in a UCITS receiving both a KIID in accordance with the UCITS-D and a KID in accordance with the PRIIPS Regulation, the application of the PRIIPs disclosure regime for UCITS is **postponed until 31 December 2021**.

5. Fees or charges levied

In order to increase transparency, ensure the equal treatment of managers and to further facilitate the cross-border distribution of collective investment funds, harmonized rules are being introduced which oblige competent authorities to:

- apply fees and charges for the supervision of cross-border activities that are **proportionate** to the overall cost of supervisory tasks carried out.
- send an **invoice, an individual payment statement or a payment instruction**, clearly setting out the means of payment and the date when payment is due.
- **publish and maintain up-to-date information** on their websites listing the applicable fees or charges or, where applicable, the calculation methodologies thereof.

In addition, ESMA is instructed to publish on its website hyperlinks to the websites of competent authorities and to develop and make available on its website a publicly accessible **interactive tool** that provides an indicative calculation of the applicable national fees or charges.

6. Facilities to investors

Harmonized rules are being introduced (i) which modernise and specify the requirements for providing facilities to retail investors under the UCITS-D and (ii) which now also apply to AIFMs that market units or shares of AIFs to *retail i*nvestors[9]. These facilities must allow the performance of the **following tasks**:

- process investors' subscription, payment, repurchase and redemption orders.
- provide investors with information on how these orders can be made and how repurchase and redemption proceeds are paid.
- facilitate the handling of information relating to the investors' exercise of their rights.
- make available for inspection by investors the information and documents required pursuant to articles 22 and 23 AIFMD and Chapter IX of the UCITS-D respectively.
- provide investors with information relevant to the tasks that the facilities perform in a durable medium.
- act as a contact point for communicating with the competent authorities.

Finally, the new rules provide that:

- it will not (no longer) be required for managers to establish a mandatory **local physical presence** as a condition for the marketing of funds in a host Member State; and
- a **third party** can be appointed to provide the facilities.

7. De-notification procedure

In order to address the uncertainties for managers due to the absence of clear and uniform conditions for the discontinuation of marketing units or shares of a UCITS or an AIF in a host Member State, harmonized rules are being introduced under which de-notification of the arrangements made for marketing as regards some or all of the units or shares can take place.

A **UCITS management company** or an **EU AIFM** may de-notify their marketing activities in a particular host Member State if all of the following conditions are fulfilled:

- except in the case of closed-ended AIFs and ELTIFs, a **blanket offer** to repurchase or redeem all units or shares held by investors in that Member State is publicly available for at least 30 working days and is addressed, directly or through financial intermediaries, individually to all investors in that Member State whose identity is known;
- the intention to terminate arrangements made for marketing such units/shares in that Member State is made public by means of a **publicly available medium**, including by electronic means, which is customary for marketing UCITS/EU AIFs and is suitable for a typical UCITS/EU AIF investor respectively;
- any **contractual arrangements with financial intermediaries or delegates** are modified or terminated with effect from the date of de-notification in order to prevent any new or further, direct or indirect, offering or placement of those units or shares.

[9] Without prejudice to the requirement to have facilities available to investors in accordance with article 26 of the ELTIF Regulation.

- with respect to UCITS only, the information provided to investors clearly **describes the consequences** for investors if they do not accept the blank offer.

Interesting to note is that in the current legislative package, the **numerical thresholds** for de notification included in the European Commission's initial proposal have been **removed**[10]. This condition was removed after feedback from the industry that this would in fact hinder cross-border distribution as managers would be less willing to enter a market without being free to decide on a future withdrawal from that market.

Finally, the UCITS management company or EU AIFM must submit a notification to the competent authority of its home Member State who will in turn submit this **notification to the competent authority** of the host Member State and to ESMA.

8. Changes to UCITS marketing notification

If the information in the (initial) UCITS marketing notification letter changes, or if share classes to be marketed change, the competent authorities of both the home and the host Member State must be notified at least a month before implementing the change.

If by implementing this change the UCITS no longer complies with the UCITS-D, the competent authority of the home Member State will notify the UCITS within 15 business days not to implement the change.

9. Cross-border marketing database

Finally, it is noteworthy to mention that the legislative package also provides for the publication by ESMA on its website of a publicly accessible **central database on cross-border marketing** of AIFs and UCITS.

10. Entry into force

The new rules will in principle enter into force on the twentieth day following that of their publication in the Official Journal of the EU, with a delayed application / transposition period respectively of 24 months for the provisions regarding (i) marketing materials, (ii) the publication of national marketing provisions, (iii) pre-marketing, (iv) investor facilities and (v) de-notification.

Next steps

Following the European Parliament's final vote on the proposals made by the European Commission, the text will be submitted to the European Council for formal adoption, signature and publication in the Official Journal of the EU.

Want to know more?

We will keep you informed about further evolutions and if you already have any questions, please contact Isabelle Blomme or Andreas Van Impe.

Contact

Isabelle Blomme
Partner
K law
T: +32 2 708 40 66
E: iblomme@klaw.be

Andreas Van Impe
Counsel
K law
T: +32 2 708 49 84
E: avanimpe@klaw.be

klaw.be

[10] In the original proposal, it was foreseen that de-notification could only take place where either (i) no investor holds units or shares or (ii) maximum 10 investors hold units or shares representing less than 1% of the AuM.