EUROPEAN
COMMISSION

Brussels, 12.3.2018
COM(2018) 92 final

2018/0041 (COD)

Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

amending Directive 2009/65/EC of the European Parliament and of the Council and Directive 2011/61/EU of the European Parliament and of the Council with regard to cross-border distribution of collective investment funds

(Text with EEA relevance)

{SWD(2018) 54} - {SWD(2018) 55}

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

• Reasons for and objectives of the proposal

The Commission has today adopted a package of measures to deepen the **Capital Markets Union ('CMU')** together with the Communication "Completing Capital Markets Union by 2019 – time to accelerate delivery". The package includes this proposal and a proposal for a regulation on facilitating the cross-border distribution of collective investment funds, which also amends Regulations (No) 345/2013[1] and 346/2013[2], as well as a proposal for an enabling EU framework on covered bonds, a proposal for an enabling framework on European crowdfunding service providers (ECSP)for businesses , a proposal on the law applicable to the third-party effects of assignments of claims, and a Communication on the applicable law to the proprietary effects of transactions in securities.

This proposal amends certain provisions in Directive 2009/65/EC[3] and Directive 2011/61/EU[4] with the purpose of reducing regulatory barriers to the cross-border distribution of investment funds in the EU. These new measures are expected to reduce the cost for fund managers of going cross-border and should support more cross-border marketing of investment funds. Increased competition in the EU will help to give investors more choice and better value.

This proposal was scheduled in the Commission Work Programme 2018[5] and should be seen in the broader context of the **CMU action plan**[6] and the **CMU Mid-Term Review**[7], to establish a genuine internal capital market by addressing fragmentation in the capital markets, removing regulatory barriers to the financing of the economy and increasing the supply of capital to businesses. Regulatory barriers, namely Member States' marketing requirements, regulatory fees and administrative and notification requirements 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**[8], the **Call for Evidence on the EU**

---

1 Regulation (EU) No 345/2013 of the European Parliament and of the Council of 17 April 2013 on European venture capital funds (OJ L 115, 25.4.2013, p. 1).

2 Regulation (EU) No 346/2013 of the European Parliament and of the Council of 17 April 2013 on European social entrepreneurship funds (OJ L 115, 25.4.2013, p. 18).

3 Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS), OJ L 302 17.11.2009, p. 32.

4 Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010, OJ L 174 7.7.2011, p. 1.

5 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Commission Work Programme 2018 An agenda for a more united, stronger and more democratic Europe.

6 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Action Plan on Building a Capital Markets Union (COM(2015)468 final).

7 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: the Mid-Term Review of the Capital Markets Union Action Plan (COM(2017) 292 final).

8 Green Paper: Building a Capital Markets Union, COM(2015) 63 final.

regulatory framework for financial services[9] and the **public consultation on barriers to the cross-border distribution of investment funds**[10].

Investment funds are investment products created with the sole purpose of pooling investors' capital and investing that capital collectively through a 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 (No) 345/2013 on European venture capital funds,
- Regulation (No) 346/2013 on European social entrepreneurship funds,
- Regulation 2015/460[11] on European long-term investment funds and
- Regulation 2017/1131[12] on money market funds.

The shared purpose of these rules is notably to make cross-border distribution easier while ensuring a high level of investor protection.

Rules for EU investment funds allow fund managers to distribute and, with some exceptions, also to manage their funds across the EU. While EU investment funds have seen rapid growth, with a total of EUR 14 310 billion in assets under management in June 2017[13], the EU investment fund market is still predominantly organised as a national market: 70 % of all assets under management are held by investment funds registered for sale only in their domestic market[14]. Only 37 % of UCITS and about 3 % of AIFs are registered for sale in more than three Member States. Compared to the United States, the EU market is smaller in terms of assets under management. However, there are considerably more funds in the EU (58 125 in the EU compared to 15 415 in the US)[15]. This means EU funds are on average significantly 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.

This proposal also recognizes that there are other factors outside the scope of this proposal which hold back the cross-border distribution of investment funds in the EU. These factors include national tax regimes applicable to investment funds and investors, vertical distribution channels and cultural preferences for domestic investment products.

- **Consistency with existing policy provisions in the policy area**

This proposal is presented together with a proposal for a Regulation on facilitating cross-border distribution of collective investment funds and amending Regulations (EU) No

---

9 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Call for Evidence — EU regulatory framework for financial services, COM(2016) 855 final.

10 https://ec.europa.eu/info/publications/consultation-cross-border-distribution-investment-funds_en.

11 Regulation (EU) 2015/760 of the European Parliament and of the Council of 29 April 2015 on European long-term investment funds (OJ L 123, 19.5.2015, p. 98-121).

12 Regulation (EU) 2017/1131 of the European Parliament and of the Council of 14 June 2017 on money market funds (OJ L 169, 30.6.2017, p. 8).

13 EFAMA, Quarterly Statistical Release Q2 2017.

14 This includes so-called 'round-trip' funds, i.e. where a manager domiciles a fund in another Member State and then distributes it only back into the market where they are based.

15 EFAMA Fact Book 2017 and Investment Company Institute (ICI) Fact Book 2017.

345/2013 and (EU) No 346/2013. It contains amendments to certain provisions applicable to the cross-border distribution of investment funds laid down in Directive 2009/65/EC and Directive 2011/61/EU. Such provisions were identified as burdensome or insufficiently clear and allowed the creation of additional requirements ('gold plating') when they were transposed into national legal systems. These amendments are consistent with objectives of the Directives, which aim to establish a single market for investment funds and facilitate the cross-border distribution of investment funds. The proposal also aligns the rules between the different legislative frameworks for investment funds. Hence, consistency with existing policy provisions is safeguarded.

- **Consistency with other Union policies**

The Commission's top priority is to strengthen the EU economy and stimulate investment to create jobs. A key element of the **Investment Plan for Europe**[16], which aims to strengthen Europe's economy and encourage investment in all 28 Member States, is creating a deeper single market for capital – a **CMU**. Deeper and integrated capital markets will improve the access to capital for companies while aiding in the development of new investment opportunities for savers.

This proposal is complementary to this objective and a **priority action in the CMU mid-term review**[17], as it contains measures to remove capital market barriers. It contributes to the development of more integrated capital markets by making it easier for investors, fund managers and invested undertakings to benefit from the single market.

2. LEGAL BASIS, SUBSIDIARITY AND PROPORTIONALITY

- **Legal basis**

This legislative action falls within the area of shared competence in accordance with Article 4(2)a of the Treaty on the Functioning of the European Union (TFEU). It aims to facilitate the establishment and the provision of services with the single market, further developing and implementing the general principles of the right of establishment and the freedom to provide services enshrined in Articles 49 and 56 TFEU.

This proposal is based on Articles 53(1) TFEU, which is the legal basis for Directive 2009/65/EC (ex Article 47(2) EC) and Directive 2011/61/EU. The internal market for investment funds is currently prevented from operating to its full potential by regulatory barriers. Such barriers include diverging national implementation of provisions of these two Directives that make it difficult for investment funds to fully benefit from their Treaty freedoms. Certain amendments to the existing rules are proposed to bring more clarity and harmonisation where needed. These amendments aim to address the detrimental effects of the identified obstacles which prevent access to the market for managers who wish to offer their investment funds in another Member State by providing services across borders or by establishing a branch in that other Member State. The proposal suggests aligning the rules applicable to UCITS and AIFMs and also proposes new measures to remove barriers to the cross-border distribution of funds.

---

16 http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1507119651257&uri=CELEX:52014DC0903

17 Further initiatives also target the facilitation of cross-border investments, e.g. guidance on existing EU standards for the treatment of cross-border EU investments and the amicable resolution of investment disputes.

- **Subsidiarity (for non-exclusive competence)**

This proposal complies with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union (TEU).

According to the principle of subsidiarity, Union action may only take place if the envisaged aims cannot be achieved by Member States alone. The identified problem, the existence of regulatory barriers to the cross-border distribution of investment funds, is not limited to the territory of one Member State. Consequently, the proposal's aim is to ensure that the internal market for the services of investment funds operates smoothly, for example by (further) harmonising the requirements regarding the providing of local facilities to investors in host Member States. Furthermore, uniformity and legal certainty of the exercise of the Treaty freedoms can be better ensured by taking action at EU level.

- **Proportionality**

This proposal complies with the principle of proportionality as set out in Article 5 TEU. The proposed measures are necessary to achieve the objective of reducing regulatory barriers to cross-border distribution of investment funds within the EU. Remaining regulatory barriers require EU action allowing for a harmonised framework, and cannot be tackled by Member States alone.

The impact assessment accompanying this proposal contains initial estimations on cost savings based on factual and realistic assumptions. The proposal will reduce the compliance burden and costs for investment funds by removing burdensome requirements and the unnecessary complexity and legal uncertainty of the rules that govern the cross-border distribution of funds. Consequently, the proposal does not go beyond what is necessary to tackle the issues at EU level.

- **Choice of the instrument**

This proposal amends Directive 2009/65/EC and Directive 2011/61/EU. Therefore, the choice of a Directive as an instrument for amending the existing rules laid down in the Directives is the most appropriate to ensure that the identified barriers are eliminated.

The objective of the new procedures on pre-marketing and de-notification introduced by this proposal is in line with the objective of Directive 2009/65/EC and Directive 2011/61/EU, which is to make it easier for collective investment fund managers to access the market. These procedures harmonise divergent practices introduced in some Member States in the areas which have not been harmonised. Taking into account the need for Member States to either supplement, or amend their national laws regulating access of investment fund managers to their markets, a Directive introducing these new procedures in the existing EU legal framework is the most appropriate choice.

3. RESULTS OF EX-POST EVALUATIONS, STAKEHOLDER CONSULTATIONS AND IMPACT ASSESSMENTS

- **Ex-post evaluations/fitness checks of existing legislation**

In preparing this proposal, the Commission carried out an in-depth evaluation of relevant provisions of Directive 2009/65/EC and Directive 2011/61/EU and additional requirements imposed by Member States.

This evaluation showed that despite its relative success, the single market falls short of realising its full potential for the cross-border distribution of investment funds, since the funds still face many barriers. In addition, the existing legal framework does not provide sufficient transparency as regards the legal requirements and administrative practices which fall outside the harmonisation introduced by Directive 2009/65/EC and Directive 2011/61/EU. The Commission's evaluation revealed that Member States take very different approaches to the requirements and verifications of marketing communications. There is also a wide variation in the fees and charges levied by the national competent authorities for supervisory tasks in accordance with Directive 2009/65/EC and Directive 2011/61/EU. These are all barriers to a wider cross-border distribution of investment funds.

- **Stakeholder consultations**

Responses to two consultation suggested that regulatory barriers to the cross-border distribution of investment funds prevented the full benefits of the single market from being realised. The first consultation, the **Green Paper on Capital Markets Union**, was launched on 18 February 2015. The second consultation, the **Call for Evidence on the EU regulatory framework for financial services,** was launched on 30 September 2015.

Additional information on national practices was sought **from competent authorities and the European Securities and Markets Authority (ESMA)**. At the Commission's request, ESMA conducted a survey of competent authorities in 2016, requesting details about current national practices in areas such as regulatory fees and marketing requirements.

Based on the input received from the CMU Green Paper and the Call for Evidence and ESMA's survey, the Commission launched a **public consultation** on 2 June 2016 **on the cross-border distribution of investment funds**[18]. Given the feedback already received, the consultation sought practical examples of the problems faced and evidence of their impact. To receive a high number of replies, the Commission organised **roadshows** with asset management associations and their members in the main asset management hubs in the EU, i.e. Luxembourg, France, Ireland, the UK, Germany and Belgium. Several meetings and conference calls were held with European and national investor associations, and the consultation was presented to the **Financial Services User Group** on 15 September 2016. In total, 64 responses were received: 52 from associations or companies, 8 from public authorities or international organisations and 4 from individuals. Most responses indicated that regulatory barriers were a significant disincentive to cross-border distribution.

At the Commission's request and based on the evidence received, ESMA conducted a **follow-up survey** in 2017 to obtain further information about specific marketing practices and notification requirements in Member States.

The Commission also organised meetings with the investment fund industry and European investor associations for more information. A **questionnaire** was sent on 30 May 2017 to eight trade bodies on the various areas covered by the cross-border distribution of investment funds. There was a particular focus on quantifying the costs caused by the regulatory barriers to cross-border distribution and determining the potential benefits of removing these barriers for asset managers and investors. Feedback suggested that the costs due to regulatory barriers are substantial: they amount to 1 to 4 % of the overall expenses of an investment fund. Also, a **targeted survey** of 60 equally represented small, medium-sized and large investment funds

[18] https://ec.europa.eu/info/publications/consultation-cross-border-distribution-investment-funds_en .

based on a randomised stratified sampling procedure was conducted in October 2017. The survey confirmed the relevance of the regulatory barriers and the need for action at EU level.

The Commission also consulted stakeholders in June and July 2017 through an **inception impact assessment**[19]. The five responses received from asset managers, their associations and financial advisors' associations supported the Commission initiative to reduce the barriers to the cross-border distribution of investment funds.

- **Collection and use of expertise**

The Commission relied on information and data from Morningstar[20], the European Fund and Asset Management Association (EFAMA) and market reports and studies by private companies. Additionally, academic literature was reviewed, in particular literature on the impact of cross-border distribution on competition and expected consumer behaviour.

- **Impact assessment**

An impact assessment was carried out to prepare this initiative.

On 1 December 2017, the Regulatory Scrutiny Board delivered a positive opinion with recommendations to further improve the draft impact assessment report. The draft report was subsequently modified to take into account the Board's comments[21]. The main changes recommended by the Board related to:

- factors that affect cross-border distribution not covered by the initiative,
- a description in the baseline of recent initiatives that have an (indirect) impact on the cross-border distribution of funds,
- the structure, presentation, assessment and comparison of the options, and
- the presentation, documentation and qualification of the quantitative methods and their results.

The revised impact assessment report and an executive summary of the impact assessment report are published with this proposal[22].

The impact assessment report considers a range of policy options. Based on their assessment, the policy choices are as follows:

(a) National marketing requirements should be more transparent at national and EU level. In addition, the definition of pre-marketing in Directive 2011/61/EU should be harmonised, and the process of checking marketing material should be framed more clearly.

(b) Regulatory fees should be more transparent at EU level, and high-level principles should be introduced to ensure more consistency in the way regulatory fees are determined.

19 https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2017-3132069_en.

20 Morningstar is an investment research and data provider.

21 The opinion of the Regulatory Scrutiny Board SEC(2018)129 final.

22 The impact assessment report and the executive summary SWD(2018)54 final and SWD(2018)55 final.

(c) The choice of facilities to support local investors should be left to managers of investment funds, with safeguards for investors.

(d) The procedures and requirements for updating notifications and de-notification of the use of the marketing passport should be harmonised more.

Together, the policy choices significantly reduce regulatory barriers. They increase the potential to have more funds marketed cross-border, improve competition, lower market fragmentation and give investors more choice in the EU. The policy choices also have indirect benefits because of their social and environmental impact. More cross-border distribution should lead to more opportunities to invest in investment funds pursuing social or environmental goals. This is turn could accelerate growth in these areas.

For all investment funds currently marketed on a cross-border basis in the EU, the policy choices together are expected to save an annual EUR 306 to 440 million in costs (recurrent costs). The savings in one-off costs is expected to be even higher: EUR 378 to 467 million. These cost reductions should act as incentives to develop more cross-border activities and support a more integrated single market for investment funds.

This Directive covers policy choices (c) and (d). The Regulation which is proposed separately covers policy choices (a) and (b).

- **Regulatory fitness and simplification**

This proposal should lead to significant cost reductions for managers of investment funds that distribute, or intend to distribute, their funds cross-border in the EU. These cost reductions will in particular have a positive effect on managers of funds who either manage a smaller number of investment funds or investment funds with less significant assets under management, since they have a smaller base over which they can spread the costs.

Although this proposal does not directly target small and medium-sized enterprises (SMEs), SMEs will indirectly benefit from this proposal. Increased cross-border distribution of investment funds will in fact accelerate the growth of EU investment funds and their investments in SMEs, in particular from venture capital funds.

- **Fundamental rights**

The proposal promotes rights enshrined in the Charter of Fundamental Rights (the 'Charter'). The main objective of this initiative is to facilitate the right to provide services in any Member State, as prescribed by Article 15(2) of the Charter, ensuring that there is no discrimination, even indirect, on grounds of nationality (further implementing Article 21(2) of the Charter). Finally, prohibition of abuse of rights, namely of the freedom to provide services, will be duly considered, as prescribed by Article 54 of the Charter.

4. BUDGETARY IMPLICATIONS

The proposal does not have a budgetary impact for the Commission.

5. OTHER ELEMENTS

- **Evaluation**

An evaluation of this Directive and the Regulation on facilitating cross-border distribution of collective investment funds and amending Regulations (EU) No 345/2013 and (EU) No 346/2013 will be conducted 36 months after the date for transposition of this Directive. The

Commission will rely on a public consultation and discussions with ESMA and the competent authorities.

- **Detailed explanation of the specific provisions of the proposal**

The proposal covers the following amendments:

(1) Amendments to Directive 2009/65/EC (Article 1)

Article 77 of Directive 2009/65/EC is proposed to be deleted. The enhanced requirements for the marketing communication are laid down in the proposal for a Regulation on facilitation of cross-border distribution of funds. These principles established for marketing communications will apply to all asset managers who market their funds, irrespective of their type. This change will ensure a level playing field and the same level of investor protection across Member States.

Article 91(3) of Directive 2009/65/EC is proposed to be deleted. This provision requires Member States to ensure that their national laws, regulations and administrative provisions 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. A parallel proposal for a Regulation on the facilitation of cross-border distribution of funds provides for specific rules on the transparency of national laws and requirements applicable to marketing communications with respect to all collective investment funds. These new rules will ensure that comprehensive, clear and up-to date information is collected and published by ESMA.

Article 92 of Directive 2009/65/EC is proposed to be amended. This provision does not impose the obligation on UCITS to have local facilities in each Member State where UCITS are marketed. However, in practice many Member States require facilities on their territory for making payments to unit-holders, repurchasing or redeeming units and making available the information which funds are required to provide. A few Member States also require these local facilities to perform additional tasks, like handling complaints or serving as a local distributor or being the legal representative (including dealing with the national competent authority).

Requirements to have local facilities are costly and have limited added value given the use of digital technology. Therefore, this proposal bans the imposition of physical presence. While requiring that facilities are established in each Member State where marketing activities are carried out and which serve situations such as making subscriptions, making payments or repurchasing or redeeming units, this proposal allows fund managers to use electronic or other means of distance communication with investors. The information and means of communication should be available to investors in the official languages of the Member State where the investor is located.

Amendments to Articles 17 and 93 of Directive 2009/65/EC aim to align national procedures for changes to the notification procedure for UCITS across funds types and across Member States. In particular, a precise time frame for communicating the competent authorities' decisions is necessary to ensure uniform rules and make the procedures applicable to collective fund managers more efficient. A precise time frame is also necessary to ensure that procedures governing changes to the information provided by AIFMs in the notification process are aligned with Directive 2011/61/EU.

A new Article 93a is added to Directive 2009/65/EC to complement the notification procedures with the conditions for UCITS who decide to stop their marketing activities in a Member State. Asset managers are allowed to de-notify the marketing of their UCITS only if a maximum of 10 investors who hold up to 1 % of assets under management of this UCITS have invested in this UCITS in an identified Member State. The competent authorities of the home Member State of this UCITS will verify the compliance with this requirement, including the transparency and publication requirement for investors and the repurchase offer. All obligations to inform will continue to apply to remaining investors after de-notification of the marketing activities in a Member State.

(2) Amendments to AIFMD (Article 2)

It is proposed to add a pre-marketing definition in Article 4(1) of Directive 2011/61/EU and to insert Article 30a laying down the conditions under which an EU AIFM can engage in pre-marketing activities. It is important to provide sufficient safeguards against potential circumvention of the requirements of Directive 2011/61/EU that apply when marketing AIFs in the home Member State or across the border in another Member State. AIFM is therefore allowed to test an investment idea or an investment strategy with professional investors but may not promote an established AIF without notification, as prescribed by the Directive. Moreover, when professional investors revert to the AIFMs following their pre-marketing activities, a subscription to the units or shares of an AIF that is ultimately established or of a similar AIF managed by that AIFM will be considered the result of marketing.

Article 32a is inserted in Directive 2011/61/EU to complement the notification procedures with the procedure and conditions for AIFMs who wish to discontinue their marketing activities in a particular Member State. An AIFM can be authorised to de-notify the marketing of an EU AIF it manages only if there are a maximum of 10 investors who hold up to 1 % of assets under management of this AIF in an identified Member State. The AIFM must notify to competent authorities of its home Member State how it fulfils the conditions for de-notification and for a public notice of the de-notification. The AIFM must also notify the authorities of the offers presented to the investors to repurchase units and shares of the AIF that is no longer going to be marketed in their Member State. All transparency requirements that investors must fulfil pursuant to Directive 2011/61/EU will continue to apply to investors who retain their investment after de-notification of the marketing activities in the selected Member State.

Article 43a is inserted in Directive 2011/61/EU to ensure a consistent treatment of retail investors regardless of the type of fund in which they decide to invest. Where Member States allow AIFMs to market units or shares of AIFs in their territories to retail investors, those AIFMs should 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 will be able to use electronic or other means of distance communication.

2018/0041 (COD)

Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

amending Directive 2009/65/EC of the European Parliament and of the Council and Directive 2011/61/EU of the European Parliament and of the Council with regard to cross-border distribution of collective investment funds

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 53(1) thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Central Bank[23],

Having regard to the opinion of the European Economic and Social Committee[24],

Acting in accordance with the ordinary legislative procedure,

Whereas:

(1) A common objective of Directive 2009/65/EC of the European Parliament and of the Council[25] and Directive 2011/61/EU of the European Parliament and of the Council[26] is to ensure a level playing field among collective investment undertakings and to remove restrictions to the free movement of units and shares of collective investment funds in the Union at the same time ensuring more uniform protection for investors. While these objectives have been largely achieved, certain barriers still hamper fund managers' ability to fully benefit from the internal market.

(2) The rules proposed in this Directive are complemented by a dedicated Regulation [*on facilitating cross-border distribution of collective investment funds and amending Regulations (EU) No 345/2013 and (EU) No 346/2013*]. It lays down additional rules and procedures concerning undertakings for collective investment in transferable securities (UCITS) and alternative investment fund managers (AIFMs) That Regulation and this Directive should collectively further coordinate the conditions for fund managers operating in the internal market and facilitate cross-border distribution of the funds they manage.

---

23 OJ C […], […], p. […].

24 OJ C , , p. .

25 Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS), *OJ L 302, 17.11.2009, p. 32*.

26 Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers (AIFM), *OJ L 174, 1.7.2011, p. 1.*

(3) It is necessary to fill in the regulatory gap and align the procedure governing notification to the competent authorities of the changes that UCITS are planning in relation to their managed funds with those which are laid down in Directive 2011/61/EU.

(4) Regulation [*on facilitating cross-border distribution of collective investment funds and amending Regulations (EU) No 345/2013 and (EU) No 346/2013*] establishes new rules requiring the European Securities and Markets Authority (ESMA), to develop draft regulatory technical standards and draft implementing technical standards to specify the information required and the forms, templates and procedures to be used for the transmission of that information in relation to management of funds, take-up or discontinuing of marketing of funds under Directive 2009/65/EC and Directive 2011/61/EU. Therefore, the provisions of those two Directives providing ESMA with discretionary empowerments to develop regulatory technical standards and draft implementing technical standards for notifications are no longer necessary and therefore should be deleted.

(5) Regulation [*on facilitating cross-border distribution of collective investment funds and amending Regulations (EU) No 345/2013 and (EU) No 346/2013*] further strengthens the principles applicable to marketing communications governed by Directive 2009/65/EC and extends their application to the AIFMs, thus resulting in a high standard of investor protection, regardless of the type of investor. As a result, the corresponding provisions of Directive 2009/65/EC relating to marketing communications and accessibility of national laws and regulation relevant to the arrangement of marketing units of UCITS are no longer necessary and therefore should be deleted.

(6) The provisions of Directive 2009/65/EC, which require UCITS to provide facilities to investors, as implemented by certain national legal systems, have proven to be burdensome. Moreover, the local facilities are rarely used by investors as intended by the Directive. The preferred method of contact has shifted to direct interaction of investors with the fund manager — either electronically or by telephone, whereas payments and redemptions are executed through other channels. While these facilities are used for administrative purposes such as cross-border recovery of regulatory fees, such issues, however, should be addressed via other means including cooperation between the competent authorities. Consequently, rules should be established, which modernise and specify the requirements for providing facilities to retail investors, a physical presence should not be required by Member States. At the same time rules should ensure that investors have access to the information to which they are entitled.

(7) In order to ensure a coherent treatment of retail investors, it is necessary that the requirements relating to facilities are also applied to AIFMs where Member States allow them to market units or shares of AIFs to retail investors in their territories.

(8) The absence of clear and uniform conditions for the discontinuation of marketing of units or shares of a UCITS or an EU AIF in a host Member State creates economic and legal uncertainty for the fund managers. Therefore, this proposal lays down clear conditions, including thresholds, under which deregistration could take place. The thresholds are indicative of when a fund manager may consider that its activities have become insignificant in a particular host Member State. The conditions are set in such a way that they balance, on the one hand, the interests of fund managers to be able to deregister marketed funds when the established conditions are met, and on the

other hand, the interests of investors in the fund from the host Member State concerned.

(9) The possibility to stop marketing UCITS or EU AIFs in a particular Member State should not come at a cost to investors, nor diminish their safeguards under Directive 2009/65/EC or Directive 2011/61/EU, in particular with regard to their right to accurate information on the continued activities of those funds.

(10) There are cases where an AIFM willing to test investor appetite for a particular investment idea or investment strategy is faced with a divergent treatment of pre-marketing activities in different national legal systems. In some Member States where pre-marketing is permitted, its definition and conditions vary considerably. However, in other Member States there is no concept of pre-marketing at all. To address these divergences, a harmonised definition of pre-marketing should be provided and conditions under which an EU AIFM can engage in these activities should be established.

(11) For pre-marketing to be recognised as such under this Directive, it should concern an investment idea or strategy without having an actual AIF already established. Accordingly, during the course of pre-marketing, investors are unable to subscribe to the units or shares of an AIF because the fund does not exist yet, and no offering documents, even in a draft form, should be permitted to be distributed to potential investors during this stage. However, when following the pre-marketing activities the AIFM offers for subscription units or shares of an AIF with the features akin to the pre-marketed investment idea, the appropriate marketing notification procedure should be observed and the AIFM should not be able to invoke reverse solicitation.

(12) In order to ensure legal certainty, it is necessary to synchronise the application dates of laws, regulations and administrative provisions implementing this Directive Regulation [*on facilitating cross-border distribution of collective investment funds and amending Regulations (EU) No 345/2013 and (EU) No 346/2013*] with regard to relevant provisions on marketing communications and pre-marketing. It is also necessary to coordinate the empowerments granted to the Commission to adopt draft regulatory technical standards and implementing technical standards, as developed by ESMA, under Regulation [*on facilitating cross-border distribution of collective investment funds and amending Regulations (EU) No 345/2013 and (EU) No 346/2013*] in the area of notifications, notification letters or written notices on cross-border activities that are to be deleted by this Directive from Directive 2009/65/EC and Directive 2011/61/EU respectively.

(13) In accordance with the Joint Political Declaration of 28 September 2011 of Member States and the Commission on explanatory documents[27], Member States have undertaken to accompany, in justified cases, the notification of their transposition measures with one or more documents explaining the relationship between the components of a directive and the corresponding parts of national transposition instruments. With regard to this Directive, the legislator considers the transmission of such documents to be justified,

[27] OJ C 369, 17.12.2011, p. 14.

HAVE ADOPTED THIS DIRECTIVE:

Article 1

Amendments to Directive 2009/65/EC

Directive 2009/65/EC is amended as follows:

(1) Article 17 is amended as follows:

(a) the following paragraph 8a is inserted:

'Where, pursuant to a change referred to in paragraph 8, the UCITS would no longer comply with this Directive, the relevant competent authorities referred to in paragraph 8 shall notify the management company within 10 working days that it is not to implement that change.

Where a change referred to in paragraph 8 is implemented after notification has been made in accordance with the first subparagraph and pursuant to that change the UCITS no longer complies with this Directive, the competent authorities of the home Member State of the UCITS shall take all due measures in accordance with Article 98.

Where a change referred to paragraph 8 does not affect the compliance of the management company with this Directive, the competent authorities of the home Member State of the management company shall, within 10 working days, inform the competent authorities of the host Member State of the management company of those changes.'

(b) paragraph 10 is deleted.

(2) in Article 18, paragraph 5 is deleted.

(3) Article 77 is deleted.

(4) in Article 91, paragraph 3 is deleted.

(5) Article 92 is replaced by the following:

'Article 92

1. Member States shall ensure that the UCITS management company establishes, in each Member State where it intends to market units of a UCITS, facilities to perform the following tasks:

(a) process investors' subscription, payment, repurchase and redemption orders relating to the units of the UCITS, in accordance with the conditions set out in the UCITS marketing documents;

(b) provide investors with information on how orders referred to in point (a) can be made and how repurchase and redemption proceeds are paid;

(c) facilitate the handling of information relating to the investors' exercise of their rights arising from their investment in the UCITS in the Member State where the UCITS is marketed;

(d) make available to investors, for inspection and for the obtaining of copies of:

(i) fund rules or instruments of incorporation of the UCITS;

(ii) the latest annual report of the UCITS;

(e) provide investors with information relevant to the tasks the facilities perform in a durable medium as defined in Article 2(1)(m).

2. Member States shall not require the UCITS management company to have a physical presence for the purpose of paragraph 1.

3. The UCITS management company shall ensure that the facilities referred to in paragraph 1 are of the following types and have the following characteristics:

(a) their tasks are performed in the official language or official languages of the Member State where the UCITS is marketed;

(b) their tasks are performed the UCITS management company itself or a third entity subject to regulation governing the tasks to be performed, or both;

For the purposes of point (b), where the facilities are performed by a third entity, the appointment of a third entity shall be evidenced by a written contract, which specifies which of the tasks referred to in paragraph 1 are not performed by the UCITS management company and that the third entity receives all the relevant information and documents from the UCITS management company.'

(6) in Article 93, paragraph 8 is replaced by the following:

'8. In the event of a change to the information in the notification letter submitted in accordance with paragraph 1, or a change regarding share classes to be marketed, the UCITS shall give written notice thereof to the competent authorities of the home Member State at least one month before implementing that change.

Where, pursuant to a change referred to in the first subparagraph the UCITS would no longer comply with this Directive, the relevant competent authorities shall notify the UCITS within 10 working days that it is not to implement that change.

Where a change referred to in the first subparagraph is implemented after notification has been made in accordance with the second subparagraph and pursuant to that change the UCITS no longer complies with this Directive, the competent authorities of the home Member State of the UCITS shall take all due measures in accordance with Article 98, including, where necessary, the express prohibition of marketing of the UCITS.

Where the changes referred to in the first subparagraph do not affect the compliance of the UCITS with this Directive, the competent authorities of the home Member State of the UCITS shall, without undue delay, inform the competent authorities of the host Member State of the UCITS of those changes.'

(7) the following Article 93a is inserted:

'*Article 93a*

1. The competent authorities of the UCITS home Member State shall ensure that UCITS may discontinue marketing its units in a Member State where it has notified its activities in accordance with Article 93, where all the following conditions are fulfilled:

(a) no investor which is domiciled or has a registered office in a Member State where the UCITS has notified its activities in accordance with Article 93 holds units of that UCITS, or no more than 10 investors which are domiciled or have a registered office in that Member State hold units of the UCITS representing less than 1 % of assets under management of that UCITS;

(b) a blanket offer to repurchase, free of any charges or deductions, all its UCITS units held by investors in a Member State where the UCITS has notified its activities in accordance with Article 93 is made public for at least 30 working days and is addressed individually to all investors in the host Member State whose identity is known;

(c) the intention to stop the marketing activities in the Member State where the UCITS has notified its activities in accordance with Article 93 is made public by means of a publicly available medium which is customary for marketing UCITS and suitable for a typical UCITS investor.

The information referred to in points (b) and (c) shall be provided in the official languages of the Member State where the UCITS has been marketed.

2. The UCITS shall submit a notification letter to the competent authority of its home Member State comprising the information referred to in paragraph 1.

3. The competent authorities of the UCITS home Member State shall, no later than 20 working days from the receipt of the notification referred to in paragraph 2, transmit it to the competent authorities of the Member State where marketing of the UCITS is intended to be discontinued and to ESMA.

Upon transmission of the notification file pursuant to the first subparagraph the competent authorities of the UCITS home Member State shall immediately notify the UCITS of that transmission. As of this date, the UCITS shall cease all marketing of its units in the Member State identified in the notification letter referred to in paragraph 2.

4. The UCITS shall continue providing investors who remain invested in the UCITS, with the information required under Articles 68 to 82 and under Article 94.

5. Member States shall allow for the use of all electronic or other distance communication means for the purposes of paragraph 4, provided the information and communication means are available for investors in the official languages of the Member State where the investor is located.'

(8) in Article 95, paragraph (2)(a) is deleted.

Article 2

Amendments to Directive 2011/61/EU

Directive 2011/61/EU is amended as follows:

(1) in Article 4(1), between points (ae) and (af), the following point (aea) is inserted:

'(aea) ''pre-marketing' means a direct or indirect provision of information on investment strategies or investment ideas by an AIFM or on its behalf to professional investors domiciled or registered in the Union in order to test their interest in an AIF which is not yet established.'

(2) the following Article 30a is inserted at the beginning of CHAPTER VI:

'*Article 30a*

Conditions for pre-marketing in the Union by an EU AIFM

1. Member States shall ensure that an authorised EU AIFM may engage in pre-marketing in the Union, excluding where the information presented to potential professional investors:

(a) relates to an established AIF;

(b) contains reference to an established AIF;

(c) enables investors to commit to acquiring units or shares of a particular AIF;

(d) amounts to a prospectus, constitutional documents of a not-yet-established AIF, offering documents, subscription forms or similar documents whether in a draft or a final form allowing investors to take an investment decision.

2. Member States shall ensure that no requirement to notify the competent authorities of pre-marketing activities is necessary for an EU AIFM to engage in pre-marketing activities.

3. Subscription by professional investors to units or shares of an AIF established following the pre-marking in accordance with paragraph 1 or to the units or shares of AIFs managed or marketed by the EU AIFM that had engaged in pre-marketing of a not-yet-established AIF with the similar features shall be considered the result of marketing.'

(3) in Article 31, paragraph 5 is deleted.

(4) in Article 32 is amended as follows:

(a) the second subparagraph of paragraph 7 is replaced by the following:

'If, pursuant to a planned change, the AIFM's management of the AIF would no longer comply with this Directive or the AIFM would otherwise no longer comply with this Directive, the relevant competent authorities shall inform the AIFM within 20 working days that it is not to implement the change.'

(b) the fourth subparagraph of paragraph 7 is replaced by the following:

'If the changes do not affect the compliance of the AIFM's management of the AIF with this Directive, or the compliance by the AIFM with this Directive otherwise, the competent authorities of the home Member State of the AIFM shall within one month inform the competent authorities of the host Member State of the AIFM of those changes.'

(c) paragraph 8 is deleted.

(5) the following Article 32a is inserted:

'*Article 32a*

Discontinuation of marketing of units or shares of EU AIFs in the Member States other than in the home Member State of the AIFM

1. Member States shall ensure that an EU AIFM may discontinue marketing units or shares of an EU AIF that it manages in the Member State where a notification of its marketing activities has been transmitted in accordance with Article 32, where all of the following conditions are fulfilled:

(a) no investor, which is domiciled or has a registered office in the Member State, where a notification of its marketing activities has been transmitted in accordance with Article 32, holds units or shares of that AIF or no more than 10 investors, which are domiciled or have a registered office in that Member State, hold units or shares of the AIF representing less than 1 % of assets under management of that AIF;

(b) a blanket offer to repurchase, free of any charges or deductions, all its AIF units or shares held by investors in the Member State, where a notification of its marketing activities has been transmitted in accordance with Article 32, is made public at least for 30 working days and is addressed individually to all investors in that Member State whose identity is known;

(c) the intention to stop the marketing activities on the territory of the Member State, where a notification of its marketing activities has been transmitted in accordance with Article 32, is made public by means of a publicly available medium which is customary for marketing AIF and suitable for a typical AIF investor.

2. The AIFM shall submit a notification to the competent authority of its home Member State comprising the information referred to in paragraph 1.

3. The competent authorities of the home Member State of the AIFM shall, no later than 20 working days following the receipt of the complete notification referred to in paragraph 2, transmit it to the competent authorities of the Member State where marketing of AIF is intended to be discontinued and to ESMA.

Upon transmission of the notification file pursuant to the first subparagraph, the competent authorities of the home Member State of the AIFM shall immediately notify the AIFM of that transmission. As of this date, the AIFM shall cease all marketing of units or shares of the AIF it manages in the Member State identified in the notification letter referred to in paragraph 2.

4. The AIFM shall continue providing investors who remain invested in the EU AIF with the information required under Articles 22 and 23.

5. Member States shall allow for the use of all electronic or other distance communication means for the purposes of paragraph 4.

(6) in Article 33, paragraphs 7 and 8 are deleted.

(7) the following Article 43a is inserted:

‘*Article 43a*

Facilities available to retail investors

1. Without prejudice to Article 26 of Regulation (EU) 2015/760[28], Member States shall ensure that an AIFM establishes, in each Member State where it intends to market units or shares of an AIF to retail investors, facilities to perform the following tasks:

(a) process investors’ subscription, payment, repurchase and redemption orders relating to the units or shares of the AIF, in accordance with the conditions set out in the AIF’s marketing documents;

(b) provide investors with information on how orders referred to in point (a) can be made and how repurchase and redemption proceeds are paid;

(c) facilitate the handling of information relating to the exercise of investors’ rights arising from their investment in the AIF in the Member State where the AIF is marketed;

[28] Regulation (EU) 2015/760 of the European Parliament and of the Council of 29 April 2015 on European long-term investment funds *OJ L 123, 19.5.2015, p. 9.*

(d) make available to investors for inspection and for the obtaining copies of:

(i) fund rules or instruments of incorporation of the AIF;

(ii) the latest annual report of the AIF;

(e) provide investors with information relevant to the tasks the facilities perform in a durable medium as defined in Article 2(1)(m) of Directive 2009/65/EC.

2. Member States shall not require an AIFM to have a physical presence for the purpose of paragraph 1.

3. The AIFM shall ensure that the facilities referred to in paragraph 1 are of the following types and have the following characteristics:

(a) their tasks are performed in the official language or official languages of the Member State where the AIF is marketed;

(b) their tasks are performed by AIFM itself or a third entity, subject to regulation governing the tasks to be performed, or both.

For the purposes of point (b), where the facilities are performed by a third entity this appointment shall be evidenced by a written contract, which specifies which of the tasks specified in paragraph 1 are not performed by the AIFM and that the third entity receives all the relevant information and documents from the AIFM.'

Article 3

Transposition

1. Member States shall adopt and publish, by [*PO: Please insert date 24 months after the date of entry into force*] at the latest, the laws, regulations and administrative provisions necessary to comply with this Directive. They shall forthwith communicate to the Commission the text of those provisions.

They shall apply those provisions from [*PO: Please insert date 24 months after the date of entry into force*].

When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

Article 4

Evaluation

By [*PO: Please insert date 36 months after the date for transposition of this Directive*] the Commission shall, on the basis of a public consultation and in light of discussions with ESMA and competent authorities, conduct an evaluation of the application of this Directive.

Article 5

Entry into force

This Directive shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

Articles 1(1)(b), 1(2) 1(8), 2(3), 2(4)(c) and 2(6) shall apply from the day of entry into force of this Directive.

Article 6

This Directive is addressed to the Member States.

Done at Brussels,

For the European Parliament	*For the Council*
The President	*The President*