

## ASSET MANAGEMENT AND INVESTMENT FUNDS

# Break For The Border: Reform Of Cross-Border Distribution Of Investment Funds

February 2020

In July 2019 the European Commission's new framework for the cross-border distribution of investment funds entered into force (the "Framework").

## AWARDS

**Ireland M&A Legal Adviser of the Year 2019**  
Mergermarket European M&A Awards

**Best Firm in Ireland 2019**  
Europe Women in Business Law Awards

**Best National Firm for Women in Business Law 2019**  
Europe Women in Business Law Awards

**Best National Firm Mentoring Programme 2019**  
Europe Women in Business Law Awards

**Best National Firm for Minority Women Lawyers 2019**  
Europe Women in Business Law Awards

**Ireland Law Firm of the Year 2019**  
Who's Who Legal

**European Finance Deal of the Year 2019 (NTMA Green Bond Transaction)**  
The Lawyer European Awards

**Most Inclusive Law Firm 2019**  
Managing Partners' Forum Awards

The Framework, comprising a regulation<sup>1</sup> and a directive<sup>2</sup> (the "Amending Regulation" and the "Amending Directive", respectively), forms part of the European Commission's Action Plan on the Capital Markets Union. The Framework will apply in each EU Member State by **2 August 2021**, but funds and fund management companies should be aware of the upcoming changes.

The Framework represents an overhaul of the current rules on the cross-border distribution of both UCITS and AIFs and is aimed at removing the barriers that prevent asset managers from fully exploiting European marketing passport provided for in the UCITS Directive and the Alternative Investment Fund Managers Directive ("AIFMD").

The Framework seeks to address the divergent regulatory and supervisory approaches relating to the cross-border distribution of UCITS and AIFs<sup>3</sup> which has resulted in "fragmentation and barriers to cross-border marketing and access to UCITS and AIFs".

The purpose of the Framework is twofold:

- to safeguard investor protection; and
- to secure a level playing field for the distribution of UCITS and AIFs,

by ensuring consistency between the marketing rules applicable to AIFs with those applicable to UCITS.

## Key Changes

The Amending Directive aims to align the notification procedure to national competent authorities ("NCAs") in respect of UCITS with the notification procedure laid down in AIFMD. The Amending Directive facilitates certain of the measures outlined in the Amending Regulation.

<sup>1</sup> Regulation on facilitating cross-border distribution of collective investment funds and amending Regulation (EU) 345/2013 and Regulation (EU) 346/2013

<sup>2</sup> Directive amending Directive 2009/65/EC and Directive 2011/61/EU with regard to cross-border distribution of collective investment funds

<sup>3</sup> including EuVECA, EuSEF and ELTIF

The key changes in the Amending Directive are set out below.

KEY CHANGE	DETAILS	EFFECTIVE DATE
Local Agents	<p>The Amending Directive notes that the requirement on UCITS to have a physical presence or to appoint a third party in each host Member State to provide local facilities to investors has proven burdensome and that local facilities are rarely used by investors.</p> <p>The Amending Directive amends the current Article 92 of the UCITS Directive in its entirety. The new provision states that NCAs shall not require a UCITS to have a physical presence in the host Member State nor to appoint a third party for the purposes of marketing units in the host Member State.</p>	2 August 2021
UCITS Cross-Border Notification Letter	<p>The Amending Directive replaces the current Article 93 of the UCITS Directive. The new provision requires that the information and address necessary for invoicing of fees and charges be included in the cross-border notification letter issued to the host NCA.</p> <p>The new provision also sets out the procedure for notifying NCAs of a change to the information in the cross-border notification letter. The change must be notified in writing to the home Member State and the host Member State at least one month in advance of the change coming into effect.</p>	2 August 2021
De-registration	<p>The Amending Directive inserts into the UCITS Directive a process whereby a UCITS can deregister in circumstances where it is no longer intended to market units in a Member State. It is envisaged that deregistration will take place by way of notification (similar to that of registration) and that a home Member State shall, within 15 working days of receipt of the notification, transmit to the relevant host Member States.</p> <p>Similarly, the Amending Directive inserts into AIFMD a new Article 32a which outlines the process whereby an AIF may be deregistered in one or more host Member State where it is no longer intended to market in that Member State.</p>	2 August 2021

The key changes in the Amending Regulation are:

KEY CHANGE	DETAILS	EFFECTIVE DATE
Marketing Communications	<p>The Amending Regulation introduces harmonised standards for marketing communications to apply equally to UCITS and AIFs. NCAs are required to publish information on national laws, regulations and administrative provisions relating to marketing communications on their websites. ESMA is required to create a central database containing summaries of national requirements for marketing communications.</p> <p>The Amending Regulation permits NCAs to require prior notification of marketing communications which fund management companies intend to use directly or indirectly in their dealings with investors. However, NCAs may not make such notifications a pre-condition to marketing and must inform the relevant fund management company of any request to amend a marketing communication within ten business days of submission.</p>	2 August 2021
Publication of Fees and Charges	<p>The Amending Regulation requires that fees and charges levied by NCAs for supervision of cross-border distribution activities be proportionate and publicly disclosed to ensure consistency in treatment between AIFMs and UCITS fund management companies and to facilitate their decision-making in respect of cross-border distribution,</p> <p>The Amending Regulation requires that NCAs send an invoice to the address indicated in the cross-border notification letter for the fees or charges due to the NCA, which invoice should outline the amount of the payment, the means of payment and the date upon which payment is due.</p>	These provisions applied from 1 August 2019.
Central Database on cross-border distribution of UCITS and AIFs	<p>The Amending Regulation requires that ESMA create and maintain a database listing:</p> <ul style="list-style-type: none"> <li>• all AIFs that are marketed in another Member State, their AIFM and a list of the Member States in which they are marketed,</li> <li>• all UCITS that are marketed in another Member State, their management company and a list of Member States in which they are marketed; and</li> <li>• NCAs are required to provide ESMA with quarterly updates on the information necessary to maintain the database.</li> </ul>	

**Pre-marketing**

Both the Amending Regulation and the Amending Directive define “pre-marketing” and set out the conditions for its use by an EU AIFM.

The Amending Directive will insert a definition of pre-marketing into AIFMD. Pre-marketing will not be permitted where the information presented to investors:

1. enables investors to commit to acquiring units or shares; and/or
2. amounts to subscription documents (in either draft or final form); and/or
3. amounts to constitutional documents, a prospectus or offering documents of a non-yet-established AIF (in final form).

NCAs need not be notified of the content

or addressees of pre-marketing, although the home Member State should be notified by informal letter within two weeks of the EU AIFM commencing pre-marketing (informing it of the Member States in which it is proposed to commence pre-marketing)

Any acquisition of units or shares by investors contacted by way of pre-marketing must be made through the process set down in Articles 31 and 32 of AIFMD.

The Amending Regulation provides for identical amendments to the applicable EuVECA and EuSEF legislation, but no such amendments have been provided in respect of the UCITS Directive.

**PRIPs**

The Framework extended the exemption for UCITS from having to produce a PRIIPs KID until 31 December 2021.

**Conclusion**

Funds and fund management companies will undoubtedly welcome the streamlining and increased transparency of the EU cross-border registration regime and, in the case of UCITS, the de-registration process introduced by the Framework, which will greatly assist funds and fund management companies in their cross-border distribution efforts.

*If you would like to discuss the foregoing, please feel free to contact a member of our team.*

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