Council of the
European Union

Brussels, 15 June 2018
(OR. en)

9910/18
ADD 1

Interinstitutional File:
2018/0041 (COD)

EF 162
ECOFIN 593
CODEC 1095

'I' ITEM NOTE

From:	General Secretariat of the Council
To:	Permanent Representatives Committee
No. prev. doc.:	9910/18 ADD 1
Subject:	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 undertakings - Mandate for negotiations with the European Parliament = Compromise proposal

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 undertakings

(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 Economic and Social Committee[1],

Acting in accordance with the ordinary legislative procedure,

[1] OJ C,, p..

Whereas:

(1) A common objective of Directive 2009/65/EC of the European Parliament and of the Council[2] and Directive 2011/61/EU of the European Parliament and of the Council[3] 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 undertakings 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 undertakings 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.

(3) It is necessary to fill in the regulatory gap and align the notification procedure to the competent authorities of the changes regarding UCITS with the notification procedure laid down in Directive 2011/61/EU.

---

[2] 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*.

[3] 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*.

(4) Regulation [*on facilitating cross-border distribution of collective investment undertakings 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 the management, take-up or discontinuing of marketing of collective investment undertakings 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 undertakings 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, and a local physical presence providing such facilities 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 denotification 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 ability of collective investment undertakings (or their managers) to deregister marketed funds when the established conditions are met, and on the other hand, the interests of investors in such undertakings.

(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 of an AIF or a compartment of an AIF, which is not yet established, or which is established, but not yet notified for marketing in that Member State. Accordingly, during the course of pre-marketing, investors are unable to subscribe to the units or shares of an AIF and no subscription forms or similar documents in a final form should be permitted to be distributed to potential investors during this stage. AIFMs shall ensure that investors do not acquire units or shares in an AIF through pre-marketing activities and that investors contacted as part of pre-marketing may only acquire units or shares in that AIF under marketing permitted under Article 31 or 32. If within 18 months after the EU AIFM engaged in the pre-marketing activities in that Member state, the AIFM offers for subscription units or shares of an AIF referred to in the information provided in the context of pre-marketing or of an AIF established as a result of the pre-marketing, this shall be considered as a result of marketing and shall be subject to notification procedure.

(11a) AIFMs shall ensure that information relating to its pre-marketing activities is available, and provided upon request, to its competent authorities after that activity takes place. This information shall include the reference to the Member States and the period of time in which the pre-marketing activities took place.

(12) In order to ensure legal certainty, it is necessary to synchronise the application dates of laws, regulations and administrative provisions implementing this Directive and Regulation [*on facilitating cross-border distribution of collective investment undertakings 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 undertakings 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[4], 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,

HAVE ADOPTED THIS DIRECTIVE:

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

Article 1

Amendments to Directive 2009/65/EC

Directive 2009/65/EC is amended as follows:

(1) In paragraph 8 of Article 17 new subparagraphs are inserted:

‘Where, pursuant to a change, the management company would no longer comply with this Directive, the competent authorities of the management company’s home Member State shall inform the management company within 15 working days of receiving all the information referred to in this paragraph that it is not to implement that change.

In this case, the competent authorities of the management company’s home Member State shall inform the competent authorities of the management company’s host Member State that the change will not be implemented.

Where a change is implemented notwithstanding the first and second subparagraphs pursuant to which the management company would no longer comply with this Directive, the competent authorities of the management company’s home Member State shall take all due measures in accordance with Article 98 and shall notify accordingly the competent authorities of the management company’s host Member State without undue delay.’

(2) Article 77 is deleted.

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

(4) Article 92 is replaced by the following:

Article 92

1. Member States shall ensure that the UCITS makes available, in each Member State where it intends to market its units, facilities to perform the following tasks:

(a) process subscription, repurchase and redemption orders and make other payments to unit-holders relating to the units of the UCITS, in accordance with the conditions set out in the UCITS 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 and access to procedures and arrangements referred to in Article 15 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 information and documents required pursuant to Chapter IX, in accordance with Article 94;

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

(f) act as contact point for communicating with the competent authority.

2. Member States shall not require the UCITS to have a physical presence in the host Member State or to appoint a third party for the purpose of paragraph 1.

3. The UCITS shall ensure that the facilities to perform the tasks referred to in paragraph 1 are provided:

(a) in the official language or one of the official languages of the Member State where the UCITS is marketed or into a language approved by the competent authorities of that Member State;

(b) by the UCITS itself or a third party subject to regulation and supervision governing the tasks to be performed, or both, including by the use of electronic means;

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

(5) Article 93 is amended as follows:

(a) in paragraph 1 a new subparagraph is inserted:

'The notification letter shall 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 and an indication of the facilities to perform the tasks referred to in Article 92, paragraph 1.

(b) 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 UCITS 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 competent authorities of the UCITS home Member State shall notify the UCITS within 15 working days of receiving all the information referred to in the first subparagaph that it is not to implement that change.

In this case, the competent authorities of the UCITS home Member State shall notify correspondingly the competent authorities of the UCITS host Member State that the change will not be implemented.

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 and shall notify accordingly the competent authorities of the UCITS host Member State without undue delay.'

(6) the following Article 93a is inserted:

'*Article 93a*

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

(a) no more than 50 investors which to the best knowledge, upon reasonable inquiry, of the UCITS, are domiciled or have a registered office in that Member State hold units of that UCITS or the units of the UCITS held in that Member State represent in total less than 1% of the assets under the management of that UCITS calculated on the basis of the most recent valuation prior to the date of submission of the notification letter referred to in paragraph 2, or any other reason accepted by the relevant host national competent authority on this basis of the specificities of their domestic market;

(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, directly or through financial intermediaries, individually to all investors in the host Member State whose identity is known to the UCITS;

(c) the intention to de-notify the 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, including by electronic means, 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 language or one of the official languages of the Member State where the UCITS has been marketed or in a language approved by the competent authorities of that Member State.

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

3. The competent authorities of the UCITS home Member State shall verify whether the notification submitted by the UCITS in accordance with paragraph 2 is complete. The competent authorities of the UCITS home Member State shall, no later than 20 working days from the receipt of the complete notification referred to in paragraph 2, transmit this notification 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 any new offering or placement 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 language or one of the official languages of the Member State where the investor is located or in a language approved by the competent authorities of that Member State.’

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 or communication on investment strategies or investment ideas by an EU AIFM or on its behalf to professional investors domiciled or registered in the Union in order to test their interest in an AIF or a compartment of an AIF, which is not yet established or which is established, but not yet notified for marketing in accordance with Article 32, in that Member state where the investors are domiciled or have their registered office, and which in each case does not amount to an offer or placement to the investor to invest in the units or shares of that AIF or a compartment.’

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

(b) amounts to subscription forms or similar documents whether in a draft or a final form;

(c) amounts to constitutional documents, a prospectus or offering documents of a not-yet-established AIF in a final form.

Where a draft prospectus or offering documents are provided, such documents shall not contain all relevant information allowing investors to take an investment decision and shall clearly state that:

(a) the document does not constitute an offer or an invitation to subscribe to units or shares of an AIF;

(b) the information presented in those documents should not be relied upon because it is incomplete and may be subject to change.

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. AIFMs shall ensure that investors do not acquire units or shares in an AIF through pre-marketing activities and that investors contacted as part of pre-marketing may only acquire units or shares in that AIF under marketing permitted under Article 31 or 32.

In particular, any subscription by professional investors, within 18 months after the EU AIFM engaged in pre-marketing, to units or shares of an AIF referred to in the information provided in the context of pre-marketing, or of an AIF established as a result of the pre-marketing shall be considered the result of marketing and shall be subject to the applicable notification procedures referred to in Articles 31 and 32.

4. For the purposes of the paragraph 3, the AIFM shall ensure that its pre-marketing activity is adequately documented.

AIFMs shall ensure that information relating to its pre-marketing activities is available, and provided upon request, to its competent authorities after that activity taking place and shall include the reference to the Member States and the period of time in which the pre-marketing activities took place.

(3) 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 of the home Member State of the AIFM shall inform the AIFM within 15 working days of receiving all the information referred to in the first subparagraph that it is not to implement the change.

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

'If a planned change is implemented notwithstanding the first and second subparagraphs or if an unplanned change has taken place pursuant to which the AIFM's management of the AIF would no longer comply with this Directive or the AIFM otherwise would no longer comply with this Directive, the competent authorities of the home Member State of the AIFM shall take all due measures in accordance with Article 46, including, if necessary, the express prohibition of marketing of the AIF and shall notify accordingly the competent authorities of the host Member State of the AIFM without undue delay.'

(4) 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 de-notify its activities 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) where the investors, to the best knowledge, upon reasonable inquiry, of the AIF, are domiciled or have a registered office in the Member State, where a notification of AIF marketing activities has been transmitted in accordance with Article 32, hold the units or shares of that AIF representing in total less than 5% of assets under management of that AIF calculated on the basis of the most recent valuation prior to the date of submission of the notification letter referred to in paragraph 2, or any other reason accepted by the relevant host national competent authority on this basis of the specificities of their domestic market;

(b) with the exception of closed-ended AIFs and funds regulated by Regulation (EU) 2015/760, 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 marketing activities has been transmitted in accordance with Article 32, is made public at least for 30 working days and is addressed, directly or through an intermediary, individually to all investors in that Member State whose identity is known;

(c) the intention to de-notify the 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 authorities 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 verify whether the notification submitted by the AIFM in accordance with paragraph 2 is complete. 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 any new offering or placement 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.

(5) Article 33 is amended as follows:

(a) the second subparagraph of paragraph 6 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 of the home Member State of the AIFM shall inform the AIFM within 15 working days of receiving all the information referred to in the first subparagaph that it is not to implement the change.

(b) the third subparagraph of paragraph 6 is replaced by the following:

'If a planned change is implemented notwithstanding the first and second subparagraphs or if an unplanned change has taken place pursuant to which the AIFM's management of the AIF would no longer comply with this Directive or the AIFM otherwise would no longer comply with this Directive, the competent authorities of the home Member State of the AIFM shall take all due measures in accordance with Article 46 and shall notify accordingly the competent authorities of the host Member State of the AIFM without undue delay.'

(6) the following Article 43a is inserted:

'*Article 43a*

Facilities available to retail investors

1. Without prejudice to Article 26 of Regulation (EU) 2015/760[5], Member States shall ensure that an AIFM makes available, 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 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;

[5] 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 information and documents in compliance with Articles 22 and 23;

(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;

(f) act as contact point for communicating with the competent authority.

2. Member States shall not require an AIFM to have a physical presence in the host Member State or to appoint a third party for the purpose of paragraph 1.

3. The AIFM shall ensure that the facilities to perform the tasks referred to in paragraph 1 are provided:

(a) in the official language or one of the official languages of the Member State where the AIF is marketed or in a language approved by the competent authorities of that member state;

(b) by the AIFM itself or a third party, subject to regulation and to supervision governing the tasks to be performed, or both.

For the purposes of point (b), where the tasks are performed by a third party, 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 party receives all the relevant information and documents from the AIFM.'

(7) In Annex IV the following points (i) and (j) are inserted:

‘(i) information and the address necessary for the invoicing or communicating of any applicable regulatory fees or charges

(j) an indication of the facilities to perform the tasks referred to in Article 43a.’

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 4a

Review

By [date to be at least 12 months after the evaluation under Article 4], the Commission shall present a report on the application of this Directive. This report shall assess, inter alia, the merits of harmonising the provisions applicable to UCITS management companies testing investor appetite for a particular investment idea or investment strategy, and whether any amendments to this Directive are needed to this end.

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*