IN-DEPTH

Asset Management

EUROPEAN OVERVIEW

Asset Management

EDITION 13

Contributing Editor

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In-Depth: Asset Management (formerly The Asset Management Review) is an incisive general introduction to the complex regulatory frameworks governing asset management activities worldwide, and the related practical issues that arise in the sector. With a focus on recent trends and developments, it covers – among other things – key regulatory hurdles; common asset management structures; main sources of investment; tax implications; and an outlook for future developments.

Generated: October 25, 2024

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European Overview

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Introduction

As part of the focus in the European Union in the past few decades on strengthening the single market in the provision of financial services, increasing numbers of asset management activities in European Economic Area (EEA) Member States[1] have been brought within the regulatory perimeter at European level. This trend looks likely to continue, at least in the short to medium term, as evidenced by a growing number of EU legislative proposals that are either directly aimed at the investment funds industry, or that will nonetheless catch investment funds, investment managers or depositaries within their scope.

Traditionally, much of the EU's legislative activity in financial services has been in the form of directives, which – unlike regulations – are not directly applicable within Member States and do not have national legal effect (except in limited specific circumstances) until transposed by Member States into their national laws. Following changes to the European supervisory architecture and the proposal to introduce a single rule book for financial services, the introduction of new EU rules relevant to financial services increasingly takes the form of directly applicable regulations.

European regulatory and supervisory framework

Key EU institutions

The European Commission (Commission) represents the interests of the European Union as a whole, and has the sole right to propose new legislation.

The Council of the European Union (Council) represents the interests of the individual Member States.

The European Parliament (Parliament) represents the interests of EU citizens, and is directly elected by them.

Legislative procedure

The Commission, after consultation with stakeholders, will put forward a legislative proposal for joint adoption by the Council and Parliament, which then usually goes through the ordinary legislative procedure (known as the co-decision procedure prior to the Treaty of Lisbon in 2009). In addition to its role in adopting legislation proposed by the Commission, the Parliament has a limited power to request the Commission to submit appropriate proposals on matters on which it considers that an EU legislative measure would be appropriate.

Lamfalussy approach to adoption of European financial services legislation

The Lamfalussy approach[2] is a four-level legislative procedure adopted by the European Union for the development of legislation for the financial services industry that involves the following:

1. legislative act (Level 1): the framework legislation is proposed and adopted under the ordinary legislative procedure. Individual articles in the legislative act specify where power is delegated to the Commission to adopt Level 2 measures;
2. implementing measures drafted and adopted by the Commission, following advice from the specialist committees (Level 2);
3. consultation and guidance by the European Supervisory Authorities (Level 3); and
4. supervision and enforcement, principally by the regulators in each Member State (Level 4).

EU supervisory framework

The European System of Financial Supervision (ESFS) is the EU supervisory framework for financial services. The ESFS comprises the European Systemic Risk Board, responsible for macro-prudential oversight, and the following European sectoral micro-prudential supervisory authorities (ESAs): the European Banking Authority (EBA); the European Insurance and Occupational Pensions Authority (EIOPA); and the European Securities and Markets Authority (ESMA).

The ESAs were established to oversee the financial system at a micro-prudential level, and to achieve convergence between Member States on technical rules and coordination between national supervisors.

Most notable of the three ESAs in this context is ESMA. The role of ESMA is supported by powers: to improve coordination among securities regulators; to act as an advisory group to assist the Commission (in particular, in the Commission's preparation of draft Level 2 implementing measures); to work to ensure more consistent and timely day-to-day implementation of EU legislation in the Member States; to draft technical standards in connection with specific areas of directives that are legally binding in Member States; to launch a fast-track procedure to ensure consistent application of EU law; in emergency situations to take decisions that bind national regulators or to intervene in the supervision of financial institutions in limited cases; to resolve disagreements between national authorities; and to undertake certain actions in respect of consumer protection (including the ability to prohibit financial products that threaten financial stability or the orderly functioning of financial markets for a period of three months).[3]

Markets in Financial Instruments Directive regime

Background

The Markets in Financial Instruments Directive regime is a key component of the EU's Financial Services Action Plan that was originally introduced in 2000 to further the harmonisation of financial markets within the European Union to facilitate a single market

in financial services. That regime is principally comprised of a Directive[4] and a directly applicable Regulation (MiFIR)[5] (together referred to as MiFID II).

MiFID II entered into force on 12 June 2014 and became applicable in Member States on 3 January 2018. Various Level 2 measures (comprising binding regulatory technical standards and implementing technical standards), which are directly applicable in Member States, have also been introduced.

Scope of MiFID II

MiFID II applies to all EEA investment firms, which are defined as legal persons whose regular occupation or business is the provision of investment services to third parties, the performance of investment activities, or both, on a professional basis. The list of relevant investment services and investment activities that fall within the scope of MiFID II includes various activities often undertaken by asset managers, such as receiving and transmitting orders relating to specified financial instruments, executing orders on behalf of clients, portfolio management and providing investment advice. The list of relevant financial instruments that fall within the ambit of MiFID II covers not only transferable securities such as shares, but also a wide range of other products, including money market instruments, units in collective investment undertakings (CIUs) and various forms of derivatives.

Investment managers accepting third-party portfolio mandates will typically be engaged in many of these activities and so will fall within the scope of MiFID II. However, despite the wide definition of investment firms, there are also some important exemptions from MiFID II. For example, CIUs and the managers of such undertakings that are subject to the prescriptive requirements of either the undertakings for collective investment in transferable securities (UCITS) regime (see Section IV) or the alternative investment funds (AIFs) regime (see Section V), will be exempt.

Conduct of business standards

MiFID II prescribes core conduct of business standards for firms providing investment services covering a wide range of issues, including, among other things:

1. in relation to conflicts of interest between firms and clients and between one client and another, in respect of which firms are required to take all appropriate steps to identify and prevent or manage, and where it is not possible to prevent damage to a client's interest to disclose the nature of the conflict and the steps taken to attempt to mitigate those risks;
2. a requirement that firms act honestly, fairly and professionally in accordance with the best interests of their clients;
3. product governance requirements, under which firms that manufacture financial instruments for sale to clients must ensure that (among other things) the instruments are designed to meet the needs of an identified target market, the distribution strategy is compatible with that target market and the firm takes reasonable steps to ensure the financial instrument is distributed to the identified target market;

4. information disclosure requirements, including that firms must provide appropriate information to clients in good time relating to the firm and its services, the financial instruments and proposed investment strategies, execution venues and all costs and related charges;
5. where a firm provides investment advice on an independent basis, requirements to assess a sufficient and diverse range of available financial instruments and not to accept or retain any fees, commissions or monetary or non-monetary benefits (inducements) paid or provided by any third party in relation to the provision of the service to clients, except minor non-monetary benefits (e.g., information or documentation relating to a financial instrument or an investment service that is generic in nature or personalised to reflect the circumstances of an individual client, such as certain types of investment research) that are capable of enhancing the quality of service provided to a client and are of a scale and nature such that they could not be judged to impair compliance with the firm's duty to act in the best interests of its clients;
6. similar restrictions on receiving and retaining inducements apply in respect of firms that provide other investment services (such as fund management services); and
7. a requirement to obtain the best possible result when executing client orders, and an obligation to execute a client's orders promptly, fairly and expeditiously.

Client categorisation

A significant feature of MiFID II is the concept of client categorisation, whereby clients are categorised as either retail clients or professional clients, according to whether they meet certain specified criteria. A professional client 'possesses the experience, knowledge and expertise to make its own investment decisions and [to] properly assess the risks that it incurs'.[6] Entities that require authorisation to operate in the financial markets will always be considered professional clients, and these include investment firms, other authorised financial institutions, and collective investment schemes (CISs) and their management companies.

In addition, large undertakings that satisfy two of the following criteria will also be considered professional clients: the balance sheet total for the entity is at least €20 million; the net turnover of the entity is at least €40 million; or the entity has own funds of at least €2 million.

Nonetheless, entities that are classified as professional clients under MiFID II may still agree with investment firms that they are to be treated as non-professionals. At the same time, clients who do not fall within the definition of professional clients are entitled to waive certain protections that would otherwise be afforded to them as non-professional clients.

MiFID II also includes a subcategory of professional client known as an eligible counterparty, which is effectively an enhanced form of professional client who receive lower protection in relation to certain aspects of MiFID II. Eligible counterparties may include investment firms, credit institutions, insurance companies, UCITS and their management companies, pension funds and their management companies, and other regulated financial institutions. Certain obligations of investment firms are disapplied in

respect of transactions involving eligible counterparties: for example, the duties to act in a client's best interest, assess the suitability and appropriateness of certain products before providing them to clients, and obtain the best possible result when executing client orders, and the obligation to execute a client's orders promptly, fairly and expeditiously, are excluded where the firm executes orders, deals on own account, or receives and transmits, orders with or for an eligible counterparty. However, investment firms are required to act honestly, fairly and professionally when dealing with eligible counterparty clients, and must communicate with them in a way that is fair, clear and not misleading. In addition, investment firms are also required to provide the same appropriate information to eligible counterparties as is supplied to other clients (including in respect of whether investment advice is provided on an independent basis, and on what basis a market assessment has been carried out, as well as the periodic communications specifying how any advice meets the personal requirements of the client).

MiFID II defines a retail client as a client who is not a professional client. Retail clients receive the highest level of regulatory protection under MiFID II, and investment firms providing services to retail clients are subject to an extensive range of conduct of business requirements that are more onerous than those that apply to professional clients.

Passporting and establishment of branches

MiFID II provides certain passporting rights to investment firms that are established and authorised in an EEA Member State. Those rights permit firms to establish, and to provide investment services from, branches in other Member States, or to provide investment services from the firm's home Member State to other Member States on a cross-border basis, or both, in each case on the basis of the firm's home Member State authorisation.

MiFID II also provides that Member States may require third-country firms wishing to provide services to retail clients and elective professional clients in their jurisdiction to establish a branch (i.e., a physical establishment) in that territory.[7] MiFID II only permits the establishment of such a branch if certain specified conditions are met,[8] including, among other things, that the third-country firm is authorised and supervised in the third country in which it is established and there are cooperation arrangements in place for sharing information on supervisory and taxation matters between the third country and the relevant Member State.

MiFIR goes on to provide limited passporting rights for third-country firms in respect of services and activities provided to wholesale clients. In particular, if a third-country firm obtains branch authorisation in an EU Member State and the Commission has recognised the third-country jurisdiction in which the firm is authorised as equivalent, the firm may provide investment services and activities to per se professional and eligible counterparty clients in other EU Member States without being required to establish a branch in each relevant Member State. In those circumstances, the third country firm would be required to comply with the passporting requirements that apply to EU investment firms.

In addition, MiFIR provides limited cross-border access to the European Union to third-country firms that wish to provide investment services to per se professional and eligible counterparty clients without being required to establish a branch in an EU Member State and without being supervised by an EU supervisory authority. That access becomes available if the firm is included in a register of third country firms maintained by ESMA.

Certain conditions must be met for a firm to be included on this register including, among other things, that the Commission has adopted an equivalence decision in respect of the jurisdiction in which the third-country firm is established, and that the firm is authorised in that jurisdiction to provide the relevant services and activities.

The UCITS regime

Background

The first UCITS Directive (UCITS I)[9] was introduced in 1985 as part of an initiative to create a cross-border single market in UCITS, a type of retail investment fund. UCITS I was designed to harmonise regulation of such schemes under a system of home Member State authorisation whereby host Member States would permit UCITS schemes authorised in the home Member State of the UCITS to be marketed in the host Member State without any further host Member State authorisation. Several Directives have since been introduced in a further effort to harmonise the UCITS market, including the Product Directive,[10] the Management Company Directive,[11] the Eligible Assets Directive,[12] the UCITS IV Directive-[13] and the UCITS V Directive.[14]

The following paragraphs set out an abstract of the UCITS rules as articulated at the EU level.

Definition of a UCITS

A UCITS is an undertaking that has the sole object of collective investment in transferable securities or certain other specified financial assets that operate on the principle of risk-spreading, and has units that, at the request of their holders, are repurchased or redeemed, directly or indirectly, out of the undertaking's assets.[15]

A UCITS does not need to have a specific legal form, and may be established via contractual arrangements, trusts or companies incorporated under statute.

Certain types of funds, however, will always fall outside the scope of the UCITS regime. They include closed-ended investment funds and funds that raise capital without promoting the sale of their units to the public within the EU.[16]

Authorisation of a UCITS

The UCITS regime requires that a UCITS fund must be authorised by its home Member State, the competent authority of which must approve the constitution and rules of the fund, the depositary chosen to hold the fund's investments and, to the extent relevant depending on the type of UCITS, the management company.[17] Once the UCITS has been authorised by the home Member State, that authorisation is valid across all Member States of the EU.

Investment policies of a UCITS

UCITS IV applies restrictions to the investment policies of a UCITS, setting out a range of permitted investments that include:

1. transferable securities and money market instruments that are admitted to or dealt on permitted regulated markets,[18] or that have been admitted to official listing on a stock exchange or are dealt with on another regulated market in a third country;[19]
2. recently issued transferable securities, provided that these have been issued subject to terms requiring that an application will be made for them to be admitted to official listing on a suitable stock exchange or other suitable regulated market,[20] and they are admitted within a year of issue;
3. units of other UCITS (thereby permitting funds of funds);
4. units of other CISs provided that these meet certain conditions (essentially an equivalent level of protection for unitholders to that provided for unitholders of a UCITS);
5. deposits with credit institutions that can be withdrawn or are repayable on demand, or that mature in no more than 12 months. The relevant credit institution must either have its registered office inside the European Union or in a third country where it is subject to prudential rules considered by the competent authorities of the UCITS's home Member State to be equivalent to the prudential requirements laid down in EU law (an approved credit institution);
6. financial derivatives (which may be dealt with on a suitable regulated market or may be over-the-counter (OTC) derivatives), provided that these meet certain specified requirements; and
7. certain money market instruments that are not dealt on a regulated market but that are issued by entities meeting certain specified criteria (which essentially cover low-risk issuers such as central banks, issuers listed on certain regulated markets or issuers who meet certain minimum capital requirements).

In addition to prescribing eligible investments, the UCITS regime includes rules on concentrations of investments so that all UCITS meet a minimum level of investment diversification. Those rules, which are relatively complex, include, for example, that a UCITS may invest no more than 5 per cent of its assets in transferable securities or money market instruments issued by any single body, or 20 per cent of its assets in deposits made with the same body.

UCITS management companies

Like UCITS themselves, UCITS management companies must be authorised by the competent authorities of their home Member State, but once granted, such authorisation is valid throughout the EU.[21]

Management companies may only carry out a limited range of activities, which consist principally of management of UCITS and other CISs (where subject to prudential supervision) and, where permitted by the relevant Member State, certain other services such as investment management of certain permitted investment portfolios, or other non-core services providing investment advice in relation to certain permitted investments and safeguarding and administering units in CISs.[22]

Management companies must meet the following requirements before authorisation may be granted by the relevant Member State:

1. the management company must have an initial capital of at least €125,000 (plus an additional 0.02 per cent of the amount by which the portfolios under management by the company exceed €250 million, provided that the total required initial capital does not exceed €10 million);[23]
2. the individuals who conduct the business of the management company must be of sufficiently good repute and sufficiently experienced in relation to the type of UCITS being managed;[24]
3. the head office and the registered office of the management company must be located in the same Member State;[25]
4. if the management company has close links with other natural or legal persons, those links must not prevent the effective exercise of the supervisory functions of the relevant home Member State regulator;[26]
5. the home Member State competent authorities must be provided with the identities and holding amounts of all shareholders or members who hold, directly or indirectly, 10 per cent or more of the capital or voting rights in the management company, and the competent authorities must be satisfied that such shareholders or members are suitable;[27] and
6. if the management company is a subsidiary, or controlled by the same person that controls an investment firm, credit institution or insurance undertaking authorised in another Member State, the competent authorities of that other Member State must be consulted before any authorisation is granted.[28]

In addition to meeting the initial requirements for authorisation, UCITS management companies must also meet certain ongoing operating conditions. Broadly speaking, these require management companies to:

1. maintain minimum levels of regulatory capital;[29]
2. observe prudential rules drawn up by the Member State in which the management company has been authorised;[30]
3. have sound administrative and accounting procedures;[31]
4. minimise conflicts of interest between itself and a client, between two of its clients, between a client and the underlying UCITS being managed, and between two UCITS;-[32] and
5. establish proper procedures to handle investor complaints and ensure that the rights of investors to complain are not restricted as a result of the fact that the management company may be authorised in a Member State other than the home Member State of the relevant UCITS.[33]

The UCITS regime also provides that a UCITS is free to be managed by a company that is authorised in a Member State other than the UCITS's home Member State,[34] while

management companies are also permitted to establish branches in other Member States subject to compliance with certain notification requirements.[35]

UCITS depositaries

UCITS must entrust the safe custody of their assets to a depositary for safekeeping.[36] It is the responsibility of the depositary to ensure the following:

1. sales, issues, repurchases, redemptions and cancellations of the units effected on behalf of a common fund comply with applicable national laws and the fund's constitution and rules;
2. the value of the units is calculated in accordance with the applicable national law and the fund's constitution and rules;
3. any instructions of the management company are carried out, unless they conflict with applicable national laws or the fund's constitution and rules;
4. any sums due to the fund or securities acquired are remitted to the fund within specified time limits;
5. income is applied in accordance with applicable national laws and the fund's constitution and rules;
6. the cash flows of the UCITS are properly monitored and, in particular, that all payments made by, or on behalf of, investors upon the subscription of units of the UCITS have been received, and that all cash of the UCITS has been booked in cash accounts that must meet certain specified conditions;
7. ensure the safekeeping of the UCITS's assets;
8. on a regular basis, provide the management company of the investment company of the UCITS with a comprehensive inventory of the UCITS's assets; and
9. subject to limited exceptions, ensure that the UCITS's assets are not reused by the depositary, or any third party to which custody function has been delegated, for their own account.

Firms must meet certain criteria to be eligible to be appointed as a depositary to a UCITS. Those criteria include, among other things, that the depositary is not the management company of the UCITS,[37] that it has its registered office, or is established, in the home Member State of the UCITS,[38] and that the depositary is a national central bank, a credit institution authorised under the CRD IV Directive[39] or an entity authorised by a national competent authority to carry out depositary activities.

The UCITS regime sets out other detailed requirements with which depositaries and management companies are required to comply in relation to the appointment of, and provision of services by, depositaries. The requirements include, among other things, provisions relating to:

1. the minimum requirements for contracts between the management company or the investment company and the depositary;
2.

obligations on the depositary relating to oversight, due diligence, segregation and insolvency protection;

3. the conditions and circumstances in which financial instruments held in custody are considered to be lost and how the depositary can discharge its liability; and
4. independence requirements for management companies, investment companies, depositaries and third parties to whom the safekeeping function has been delegated.

A depositary's liability for the loss of financial instruments held in custody is not generally affected by delegation to a sub-custodian, and a depositary is not able to exclude its liability through contractual arrangements. However, a depositary will not be liable if it can show that the loss is a result of an external event beyond its reasonable control, the consequences of which would have been unavoidable despite all reasonable efforts to the contrary. This liability of depositaries differs from the position under the Alternative Investment Fund Managers Directive (AIFMD)[40] (particularly in relation to contractual modification of liability). However, this divergence seems reasonable given that the UCITS regime is designed to protect retail investors.

UCITS mergers

The UCITS regime provides three methods for the domestic and cross-border mergers of UCITS:

1. the merging UCITS is dissolved without going into liquidation, and transfers all of its assets and liabilities to a second UCITS in exchange for the issue of units to its unitholders (with, if applicable, a cash payment not exceeding 10 per cent of the net asset value);
2. two UCITS are dissolved without going into liquidation, and transfer all of their assets and liabilities to a new UCITS in exchange for the issue to their unitholders of units (possibly with a cash payment not exceeding 10 per cent of the net asset value); or
3. a UCITS transfers its assets to a newly formed UCITS or another existing UCITS, but is not dissolved and continues to exist until its liabilities have been discharged.[41]

To come into effect, a merger must be authorised by the competent authorities of the home Member State of each merging UCITS. Those authorities must be provided with certain key information, including the terms of the proposed merger.[42] The competent authorities of the merging UCITS's home Member State will then forward that information to the competent authorities of the other UCITS's home Member State, which may require that the information to be given to unitholders is modified.

The competent authorities of the home Member State of the merging UCITS must authorise the merger if:

1. the competent authorities in the home Member States of both the merging and receiving UCITS are satisfied with the information that it is proposed to be provided to unitholders;

2. the receiving UCITS has been approved to market its units in the Member State and in all Member States where the merging UCITS has been approved to market its units; and
3. certain other requirements have been met, such as the validation of the criteria used to value the assets of the relevant UCITS in order to calculate the relevant exchange ratio by the depositary.

If the national laws of Member States require unitholders to vote to approve the merger, the approval must not require more than 75 per cent of the votes cast at a unitholders' general meeting.[43] The quorum requirements cannot be more onerous for cross-border UCITS mergers than for domestic UCITS mergers, and cannot be more onerous for UCITS mergers than for corporate mergers.

Master-feeder UCITS structures

The UCITS regime permits the use of feeder UCITS. These are UCITS that, by way of exception to the general rules preventing concentrations of investment by UCITS, are permitted to invest up to 85 per cent of their assets in another UCITS (a master UCITS),-[44] provided they comply with certain requirements including, among others, that they have received the prior approval of the competent authorities of the feeder UCITS's home Member State.[45] The 15 per cent balance may be held in ancillary liquid assets, derivatives used only for hedging purposes or property that is essential for the direct pursuit of the business.[46] A master UCITS must have at least one feeder UCITS among its unitholders, may not itself be a feeder UCITS and may not hold units in any feeder UCITS.[47]

Investor information requirements

Broadly speaking, a UCITS must publish a prospectus, an annual report for each financial year within four months of the end of that year and a half-yearly financial report within two months of the half-year end.[48]

The prospectus is required to contain all the information necessary for investors to make an informed judgement about investing in the UCITS and the risks attaching to that investment. In addition, independently from the information provided about the investment instruments themselves, the prospectus must contain a clear explanation of the general risk profile of the UCITS and the details or summary of the remuneration policy.[49] The UCITS regime also specifies certain minimum content requirements for prospectuses, including general details of the UCITS, the rights attaching to units, its investment objectives, and its rules relating to income and asset valuation. The prospectus must also indicate the categories of assets in which the UCITS is permitted to invest and explain its approach to the use of derivatives.[50]

The content requirements for reports include, for instance, in relation to annual reports that the reports must include:

1. a balance sheet or a statement of assets and liabilities;
2. an income and expenditure account for the relevant financial year;
3. a report on its activities during the financial year; and

4. information on the number of units in circulation, the net asset value per unit and comparative tables showing that information for the past three financial years.

In addition, UCITS are required to provide key investor information documents (KIIDs) to investors that are designed to assist them in making key investment decisions on an informed basis. The KIID must contain certain essential elements, including, among other things:

1. identification of the UCITS and its competent authority;
2. a description of its investment objectives and its investment policy;
3. a presentation of the UCITS's past performance or performance scenarios;
4. the UCITS's costs and associated charges;
5. a risk-reward profile of the investment in the UCITS, including any appropriate guidance and warnings in relation to the risks that are associated with any investments in the UCITS;
6. information on where and how to obtain additional information relating to the proposed investment, including but not limited to where and how the prospectus and the annual and half-yearly reports can be obtained on request and free of charge at any time, and the language in which such information is available to investors; and
7. a statement of the details of the up-to-date remuneration policy including, but not limited to, the following:
    - a description of how remuneration and benefits are calculated;
    - the identities of persons responsible for awarding the remuneration and benefits, including the composition of the remuneration committee (where such a remuneration committee exists): these must be made available by means of a website; and
    - a reference to that website, and the fact that a paper copy will be made available free of charge upon request.

The information must be presented in a manner comprehensible to an investor without requiring reference to information in any other documents. There is a general requirement for all key investor information to be written in concise and non-technical language and drawn up in a common format to allow for easy comparison by investors.[51] To encourage consistency, ESMA provides a template on its website that may be used as the basis of a KIID.[52]

Investors (in particular retail investors) will receive, before units can be purchased, the KIID, on the principle that the UCITS structure is simple enough and sufficiently well-regulated that the KIID provides enough basic information to permit an informed investment decision. In particular, the principal advantage of the KIID may prove to be that it can be used as a pan-European template, although language differences may limit the possibilities for economies of scale.

Cross-border distribution of UCITS

The UCITS regime provides a passporting system for the cross-border marketing of UCITS within the European Union. In particular, where a UCITS proposes to market its units to investors in a host Member State, it must submit a notification and certain prescribed information to the competent authority in its home Member State. That competent authority must, on receipt of a complete notification, transmit that information and an attestation to its completeness to competent authorities in the relevant host Member States within 10 business days, and notify the UCITS that it has done so. The UCITS is permitted to market its units in the relevant host Member States from the date it receives the notification from its home Member State competent authority.

The Cross-border Funds Marketing Directive[53] sets out certain additional requirements for UCITS management companies in connection with the cross-border marketing of UCITS in the European Union, including, for example, that they are required to provide local facilities to support investors (e.g., facilities to process subscriptions, repurchase and redemption orders, and to make other payments to unitholders relating to the units of the UCITS). The Directive also provides for the 'denotification' of UCITS, subject to certain conditions being met, where the management company determines that it no longer wishes to market a UCITS in a Member State.

The Cross-Border Funds Marketing Regulation[54] sets out additional principles with which UCITS management companies are required to comply, including that marketing communications must be identifiable as such and must describe the risks and rewards of purchasing units in a UCITS in an equally prominent manner. The Regulation also provides that, among other things, all information included in marketing communications for UCITS must be fair, clear and not misleading, and the content of marketing communications must be consistent with the UCITS prospectus and KIID.

The Cross-Border Funds Marketing Regulation also provides that competent authorities in Member States are permitted to require prior notification of marketing communications from UCITS management companies to investors, provided this notification does not constitute a precondition to marketing the UCITS.

Sanctions for breach of UCITS requirements

The UCITS regime sets out broad categories of breaches for which national regulators must provide penalties, and lists the administrative sanctions and measures that competent authorities should be empowered to apply, including:

1. public warnings or statements of censure identifying the person responsible and the nature of the breach;
2. temporary suspension or permanent withdrawal of UCITS or management company authorisation;
3. effective, proportionate and dissuasive administrative pecuniary sanctions up to a maximum of €5 million or 10 per cent of annual turnover for companies, and up to a maximum of €5 million for individuals; and
4. fines of up to twice the amount of any profits gained or losses avoided as a result of the breach.[55]

Future outlook

As a result of the impacts of the COVID-19 pandemic, many EU investment funds experienced a reduction in liquidity, driven by valuation uncertainty and significant investment outflows from investors. These effects were compounded in respect of funds invested in illiquid assets. In response to this situation, the European Systemic Risk Board (ESRB) identified those funds that have significant exposure to corporate debt and real estate as requiring enhanced scrutiny regarding financial stability, as a matter of priority.[56] The ESRB also recommended that ESMA conduct a supervisory exercise to assess the preparedness of funds exposed to corporate debt and real estate for potential further investor redemption and valuation uncertainty. ESMA carried out this exercise and published their findings in a report in November 2020.[57] The report found that relatively few funds were forced to suspend subscriptions and redemptions as a result of the market stress caused by the COVID-19 pandemic; however, this finding may have been the result of proactive intervention by governments and central banks to counteract market risks faced by investment funds. The report identified five areas of priority to enhance the preparedness of funds and reduce the liquidity and valuation risks at the level of the investment fund:

1. ongoing supervision of the alignment of the funds' investment strategy, liquidity profile and redemption policy by national competent authorities (NCAs);
2. ongoing supervision of liquidity risk assessment by NCAs;
3. fund liquidity profiles;
4. increase of the availability and use of liquidity management tools; and
5. supervision of valuation processes in a context of valuation uncertainty.

In January 2021, ESMA launched a common supervisory action (CSA) with NCAs to assess the compliance of entities with cost-related provisions contained in the UCITS framework and the obligation to not charge undue costs to investors. The outcome of the CSA in 2023 on costs and fees showed divergent market practices as to what industry reported as “due” or “undue” costs and it evidenced that further legislative specification of the notion of “undue costs” would provide more convergence and a stronger legal basis for NCAs to take supervisory and enforcement actions against the relevant market participants in many cases.[58]

The AIFMD

Background

The AIFMD came into force on 21 July 2011, and Member States were required to implement it by 22 July 2013. The stated objective of the AIFMD is to ensure that all managers of AIFs are authorised and subject to harmonised regulatory standards across the European Union. The AIFMD regulates fund managers operating within the European Union rather than directly regulating the funds themselves, many of which may be based outside the European Union.

Overview of the AIFMD

The AIFMD applies to AIFMs, meaning any person whose regular business is managing one or more AIFs. Managing means the provision of portfolio management services and risk management services for an AIF. An AIF is any CIS that is not covered by the UCITS regime.-[59] As well as applying to AIFMs that manage or market AIFs (wherever those funds are established) in the European Union, the AIFMD also applies to AIFMs established outside the European Union that manage AIFs established in the European Union, and to non-EU AIFMs that market one or more AIFs (wherever established) within the European Union.[60] The AIFMD has a very wide scope, with few exemptions, but AIFMs that manage AIFs the value of whose assets under management fall below specified thresholds are exempt from most of the provisions of the AIFMD.[61]

Key features of the AIFMD include:

1. AIFMs that manage AIFs must be authorised. To be authorised, an AIFM must, among other conditions, exceed certain minimum capital requirements;
2. restrictions on the levels of remuneration for senior management and risk-takers;
3. AIFMs must be able to show that specific safeguards are in place against conflicts of interest;
4. AIFMs will be required to manage and monitor liquidity risks and conduct regular stress tests;
5. AIFMs will be required to set a maximum level of leverage for each AIF;
6. extensive requirements in relation to the valuation of managed assets, delegation of the AIFM's functions and the use of a depositary to safeguard an AIF's assets;
7. business conduct principles for AIFMs, including requirements to act with due skill, care and diligence, and to act in the best interests of the AIF and its investors;
8. a requirement to produce annual reports, and to make disclosures to investors and regulators on an ongoing basis;
9. restrictions on asset stripping; and
10. a marketing and passport regime that enables an EU AIFM authorised in its home Member State to manage and market EU AIFs both domestically and in other Member States without requiring additional authorisation in those other Member States.

Marketing is defined in the AIFMD as the direct or indirect offering or placement of units or shares in an AIF to, or with, investors domiciled in the European Union. Significantly, this does not include marketing that is independent of the AIFM marketing to investors outside the European Union or passive marketing, where the initiative is taken by the investor rather than the AIFM. This extremely important concession continues to allow European pension funds and other experienced investors to access hedge funds, in particular the 70 per cent managed in the US, without the funds having to comply with the AIFMD. The question of whether to make the passporting regime available in respect of non-EU AIFs and AIFMs was the subject of heated debate prior to the publication of the AIFMD. The compromise

that was adopted involves the deferral of the non-EU passporting provisions set out in the AIFMD. ESMA published its final advice on the extension of the passporting regime in July 2016. The Commission has so far not acted upon the final advice provided by ESMA, and in the meantime national private placement regimes continue to operate. ESMA did publish a report on the findings of its thematic study on notification frameworks and home-host responsibilities under the UCITS regime and the AIFMD in April 2017, which aims to facilitate the smooth operation of EU passports for marketing and management of UCITS and AIFs. The proposed AIFMD II seems to finally be making some headway on this issue.[62]

Details on the key features of the AIFMD listed above, as implemented in the national law of Member States, are outlined in the national chapters.

Level 2 measures and Level 3 guidance

The provisions of the AIFMD outline the framework of the regime, but the details have been determined by Level 2 implementing measures.

The Commission adopted a Delegated Regulation[63] on exemptions, general operating conditions, depositaries, leverage, transparency and supervision. This regulation is directly applicable in all Member States, and has applied since 22 July 2013. The Delegated Regulation includes provisions relating to:

1. the calculation of assets under management and leverage;
2. additional own funds and professional indemnity insurance;
3. conflicts of interest;
4. risk and liquidity management;
5. delegation of AIFM functions;
6. the obligations and rights of depositaries; and
7. transparency obligations to both investors and supervisory authorities.

The Commission adopted a Delegated Regulation to determine types of AIFMs, whether an AIFM is an AIFM of open-ended AIFs or closed-ended AIFs, and to ensure uniform conditions of application of the AIFMD, on 17 December 2013.[64] In addition, the Commission adopted a Delegated Regulation on the information to be provided by national competent authorities to ESMA, which entered into force on 16 April 2015.[65]

The Commission also adopted two Implementing Regulations, one to establish a procedure for determining the Member State of reference of a non-EU AIFM[66] and the other to establish the procedure for AIFMs to opt in under the AIFMD.[67]

To supplement these Level 2 measures, ESMA issued Level 3 Guidelines. These provide guidance to national regulators in the European Union as to how to implement directives, regulations and technical standards (Level 1 and 2 measures). While the Guidelines are not legally binding, regulators and market participants should make every effort to comply with them. National regulators are required to incorporate these Guidelines into their supervisory practices or explain why they have not done so.

ESMA published Guidelines on key concepts of the AIFMD[68] that give guidance on the definition of an AIF,[69] Q&As on the application of AIFMD,[70] and Guidelines[71] on reporting obligations under the AIFMD that set out the information AIFMs should report to regulators and the times when reports must be made.

On 7 April 2017, ESMA published the findings of its thematic study on notification frameworks and home-host responsibilities under the AIFMD and the UCITS Directive.[72] ESMA subsequently produced opinions regarding the delegation model on 17 and 20 July 2017.[73] For further detail on the impact of ESMA's actions in light of Brexit, see the United Kingdom chapter.

The reforms to the rules on marketing to investors that have been introduced by the Cross-Border Funds Marketing Regulation also apply in respect of the marketing by AIFMs or AIFs.

In addition, since 1 April 2020 a Delegated Regulation to amend the AIFMD Level 2 Regulation as regards safe-keeping duties of depositaries has applied.[74] Although securities and insolvency laws are not harmonised across the European Union, the Delegated Regulation attempts to harmonise rules on safe-keeping of AIF assets by ensuring the clear identification of those assets when they are held by a third-party custodian.

In relation to the AIFMD, the Cross-border Funds Marketing Directive aims to clarify the scope of 'pre-marketing' activities that an EU AIFM may engage in without making a prior notification to the competent authority in its home Member State. This has been a controversial area given that Member States have historically taken different approaches to the meaning of 'marketing' for the purposes of AIFMD. However, the Cross-border Funds Marketing Directive introduces a new definition of 'pre-marketing' and certain conditions that must be met for interactions with potential investors to amount to 'pre-marketing' activity, rather than 'marketing' activity, which would in turn require prior notification to the competent authority in its home Member State. The Cross-border Funds Marketing Directive also introduces a notification procedure for AIFMs that wish to discontinue marketing activities in a Member State.

Solvency II

Current regime

The insurance sector is a key provider of the funds under discretionary fund management. This reflects the fact that insurers hold assets and capital to meet their liabilities to policyholders and satisfy their regulatory capital requirements.

Overview

The Solvency II Directive (Solvency II)[75] came into force on 1 January 2016, and introduced a new, harmonised EU-wide insurance regulatory regime, replacing various EU insurance directives including the Recast Life Directive.[76] The key objectives of Solvency II are improved protection of policyholders, a move towards a more risk-based approach to prudential regulation and harmonisation of national supervisory regimes.

Further detail of the regime is set out in the Solvency II Delegated Regulation (Level 2), which came into force on 18 January 2015.[77] EIOPA has published Implementing Technical Standards and Guidelines supplementing Level 1 and Level 2 measures.

The Solvency II regime is divided into three areas known as pillars: quantitative requirements; governance, risk management and supervisory review; and disclosure and transparency. It applies to all EU insurers and reinsurers, subject to some very limited exceptions.[78] Solvency II has been subject to subsequent amendments.[79]

Capital requirements

Firms are required to establish technical provisions reflecting their expected future liabilities to policyholders and to hold assets sufficient to cover those technical provisions.-[80] In addition, firms need to have capital to cover the minimum capital requirement (MCR), which is the minimum level of solvency below which a firm risks the withdrawal of its authorisation, and the solvency capital requirement (SCR), which is a higher level of capital below which supervisory intervention will be triggered. In exceptional circumstances, national supervisors have the discretion to require an insurer to maintain further capital in addition to the SCR, known as the capital add-on. The types of capital (referred to in Solvency II as own funds) that insurers may use to satisfy the MCR and SCR are classified by means of a system that classifies own funds into three tiers according to the extent to which they possess the characteristics of permanent availability and subordination, with Tier 1 being the highest of the tiers. Limits will apply to the amounts of Tier 2 and Tier 3 own funds that can be used to meet a firm's capital requirements.

Prudent person principle

The prudent person principle under Solvency II provides requirements relating to the investment of insurers' assets. The key requirements are that:

1. insurers only invest in assets and instruments whose risks can be properly monitored, managed and controlled;
2. all assets must be invested in such a manner as to ensure the security, quality, liquidity and profitability of the portfolio as a whole;
3. derivative instruments may be used only insofar as they contribute to a reduction of risks or facilitate efficient portfolio management; and
4. assets held to cover technical provisions shall be invested in a manner appropriate to the nature and duration of the insurer's liabilities, and in the best interests of policyholders and beneficiaries.[81]

Look-through principle

Solvency II introduces a greater focus on transparency of investments, involving a look-through approach to risk assessment whereby, for the purposes of the SCR calculation, the underlying investments held by investment funds in which an insurer is invested are treated as direct holdings.[82] This may be a challenge for managers of funds

of funds as, if insurers are to invest, the managers will need to be able to provide detailed information on the underlying portfolio.

Disclosure and reporting

Firms are required to produce a solvency and financial condition report on an annual basis, which must contain the following information in relation to a firm:

1. its business and performance;
2. its system of governance and an assessment of its adequacy for the risk profile of the firm;
3. risk exposure, concentration, mitigation and sensitivity for each category of risk;
4. the bases and methods used for the valuation of assets, technical provisions and other liabilities; and
5. capital management, including (at least):
    - the structure and amount of own funds, and their quality;
    - the amounts of the SCR (including, subject to a transitional Member State option, any capital add-on) and the MCR;
    - the option used for the calculation of the SCR;
    - an explanation of the main differences between the underlying assumptions of the standard formula and the internal model used for the SCR calculation, where relevant; and
    - the amount of any non-compliance with the MCR or any significant non-compliance with the SCR during the reporting period, and an explanation of the reasons for and impact of the non-compliance and any remedial measures taken.[83]

Insurers are required to demonstrate that the data is sufficiently complete, accurate and appropriately verified, and asset managers must ensure that the information they supply to insurance customers meets the same standards.[84]

Prudential framework for investment firms

Background

To implement the Basel III rules made by the Basel Committee on Banking Supervision, on 20 July 2011 the Commission introduced proposals for a new directive, known as CRD IV,[85] and a new regulation, the Capital Requirements Regulation (CRR).[86]

In December 2017, the Commission adopted proposals for a Regulation (IFR) on the prudential requirements on investment firms and a Directive (IFD) on the prudential supervision of investment firms.[87] The IFR has applied from, and Member States were required to implement the IFD by, 26 June 2021.

The IFR framework replaces the existing prudential requirements set out in the CRR for most investment firms authorised under MiFID. The aim is to simplify the prudential classification of investment firms and establish a single harmonised approach to their prudential requirements. It also seeks to increase proportionality and risk-sensitivity and reduce the complexity of the existing system. It is not intended to increase capital requirements significantly beyond the current level.

Capital Requirements Directives and Capital Requirements Regulation

Member States were required to transpose CRD IV into national law by 31 December 2013. The CRR took effect from 1 January 2014. Several pieces of delegated legislation have been published by the Commission since December 2013 supplementing CRD IV with regard to certain regulatory technical standards and implementing technical standards, and to the liquidity coverage ratio (LCR).

The CRD IV regime applies, broadly speaking, to investment firms that are subject to MiFID. However, the following fall outside its scope:

1. firms that are not authorised to perform safekeeping and administration of financial instruments;
2. firms that provide only one or more of the investment services and activities listed in points 1 (Reception and transmission), 2 (Execution of orders), 4 (Portfolio management) and 5 (Investment advice) of Section A of Annex 1 MiFID; and
3. firms that are not permitted to hold client money or securities.

In practice, this provides an exemption for many asset management firms.

CRD IV makes investment firms subject to revised capital adequacy rules that require them to maintain a basic capital conservation buffer in addition to their basic minimum regulatory capital requirement.[88] Firms may also, at the discretion of individual supervisory authorities, be required to maintain a counter-cyclical capital buffer to guard against losses that result from a sudden downturn following a period of economic growth.[89] If investment firms fail to maintain the required capital buffers, they are subject to restrictions on their ability to make distributions and a prohibition on the payment of variable remuneration where the obligation to pay was created at a time when the capital buffer requirements were not met.[90]

On 6 February 2015 the Delegated Regulation,[91] which sets out detailed requirements for firms to hold sufficient unencumbered high-quality liquid assets as determined using the LCR, came into force

In addition, CRD IV requires competent authorities to ensure that firms have policies and procedures in place to identify, manage and monitor the risk of excessive leverage.[92] Investment firms must address the risk of excessive leverage by taking account of potential reductions in their regulatory capital that may result from expected or realised losses, and should be able to withstand a range of potential stress events impacting regulatory capital.[93]

CRD IV also subjects firms to enhanced corporate governance requirements, and a requirement to establish risk committees composed of non-executive members of their

management bodies to advise management on the risk profile of a firm and on its ongoing risk strategy.[94] In addition, CRD IV requires firms to disclose the number of individuals receiving remuneration of €1 million or more in each financial year.[95] CRD IV also implements a bonus cap under which variable remuneration cannot exceed fixed remuneration unless authorised by shareholders, in which case variable remuneration can be up to twice the fixed remuneration.[96]

In November 2016, the Commission published its proposals for amendments to CRD IV and the CRR (also referred to as CRD V and CRR II). On 27 June 2019, CRD IV[97] and CRR II[98] entered into force. For the most part, CRR II has applied from 28 June 2021, and Member States were required to implement and apply CRD V by 28 December 2019. CRD IV and CRR II include measures to ensure compliance with international standards and certain EU-specific reforms, including:

1. a binding leverage ratio requirement of 3 per cent for all firms within the scope of CRD IV;
2. a binding net-stable funding ratio (NSFR) of at least 100 per cent on credit institutions and systemic investment firms;
3. more risk-sensitive own funds requirements, including changes in respect of the calculation of own funds requirements for market risk, counterparty credit risk, large exposures, exposures to central counterparties and equity investments in CIUs; and
4. amendments to the minimum requirement for own funds and eligible liabilities to ensure that global systemically important institutions hold certain minimum levels of loss-absorbing capital and instruments in line with the total loss-absorbing capacity standards recommended by the Financial Stability Board.

The NSFR sits alongside the LCR as a method to assess whether a firm has adequate stable funding to prevent liquidity mismatches. The NSFR is a ratio of an institution or firm's available stable funding to the amount of stable funding required by it over a one-year period, and an NSFR of 100 per cent would therefore require the relevant institution or firm to hold at all times sufficient stable funding to meet its funding needs. Stable funding is defined as those types and amounts of equity and liability financing expected to be reliable sources of funds over a one-year period under conditions of extended stress.

Regarding the own fund requirements under CRD V in respect of CIUs, the amendments set out a more risk-sensitive approach to calculate own funds requirements for exposures to CIUs (which includes UCITS and AIFs). In addition to a standardised approach, CRD V incorporates a look-through and mandate approach that calculates own funds requirements based, respectively, on the underlying exposures or mandate of the relevant CIU.

IFR and IFD

Under the revised prudential framework set out by the IFR and the IFD:

1. certain systemically important firms will be reclassified as credit institutions, and will remain subject to the existing regime under the CRR and CRD IV. If these firms

are established in Member States participating in the banking union, they will come within the scope of the single supervisory mechanism;

2. all other investment firms will be subject to the new prudential framework, replacing the requirements set out in the CRR and the CRD IV Directive. Certain small and non-interconnected investment firms will be subject to a more limited prudential regime;
3. quantitative indicators, referred to as 'K-factors', which are intended to represent various risks to which the firm is exposed, will be used to classify investment firms and determine the capital requirements methodology to which they will be subject. The K-factors include 'risk-to-customer' factors, 'risk-to-market' factors, and 'risk-to-firm' factors; and
4. investment firms will be subject to revised remuneration and governance standards.

Firms have generally been required to comply with the requirements of the new prudential framework from 26 June 2021. However, the IFR contains certain measures to delay the transition from the CRD V/CRR II regime to the IFD/IFR regime for certain investment firms until 26 June 2026. For example, the IFR limits capital requirements for firms that would otherwise more than double under the new framework to twice the CRD V/CRR II capital requirements until that date.

The new prudential framework is also intended to tighten requirements relating to equivalence decisions taken in relation to third countries and the supervision of firms with parent undertakings in third countries. Where a firm has its parent undertaking in a third country, if the relevant EU supervisory authority considers that the firm is not subject to supervision by the third country that is equivalent to the supervision under this new prudential framework, it may require the establishment of an investment holding company or mixed financial holding company in the EU.

Remuneration for investment firms and fund managers

The MiFID II, UCITS and AIMFD regime requires management companies to establish and apply remuneration policies and practices that are consistent with, and promote, sound and effective risk management, and that neither encourage risk-taking that is inconsistent with the risk profiles, rules or instruments of incorporation of the funds that they manage, nor impair compliance with the management company's duty to act in the best interest of the investors or relevant fund.[99] The principles that investment firms must comply with when establishing and applying their remuneration policies include, for example, that at least half of the variable part of the remuneration of investment firms must be paid in equity instruments of the investment firm or its parent entity.[100] Similarly, for UCITS managers, the remuneration policy prescribe that at least half of the variable part of the remuneration of management companies must be paid in assets of their UCITS, unless the management of the UCITS accounts for less than half of the total portfolio.[101] Payment of at least a further 40 per cent of this variable remuneration (or 60 per cent if the variable remuneration is of a particularly high amount) is to be deferred for a minimum of three years[102] to encourage portfolio or fund managers to take a long-run view.

Regulation on short selling and credit default swaps

The European Regulation on short selling and certain aspects of credit default swaps (Short Selling Regulation)[103] was published in the OJ on 24 March 2012 and took effect on 1 November 2012. Significant provisions of the Short Selling Regulation include:

1. transparency: firms are required to disclose short positions relating to shares admitted to trading on a regulated market or MTF and EU sovereign debt, taking into account positions in credit default swaps referencing an EU sovereign debt obligation;[104]
2. restrictions on uncovered positions: a firm that wishes to take out an open position in shares needs to have borrowed the shares, entered into an agreement to borrow the shares or made other arrangements to ensure that settlement can be effected when due.[105] There are further restrictions on open positions in sovereign debt or through credit default swaps (where the positions are not hedged); and
3. supervisory intervention: competent authorities in individual Member States may, in exceptional circumstances, take measures including further transparency requirements or temporary short-selling bans, while ESMA may intervene (i.e., by taking direct control of the regulation of short selling in an individual Member State and overruling the national regulator) if it considers there to be a significant threat (e.g., to the stability of the market).[106]

These requirements apply regardless of where the person effecting the short sale is domiciled. However, there is an exemption from the transparency requirements for shares whose principal trading venue (i.e., the regulated market or MTF) is located outside the EU.

For fund managers managing several funds, the calculation of the net short position in a particular issuer is conducted at the level of each individual fund and for each portfolio under management. A discretionary manager should aggregate net short positions of funds and portfolios for which the same investment strategy is pursued in respect of a particular issuer. Where a single entity performs management and non-management activities (such as proprietary trading), it should conduct two separate calculations and, in some instances, may have to make two reports.

The qualifying holdings regime

The 'qualifying holdings regime' comprises certain requirements imposed across various pieces of EU financial services sectoral legislation, particularly MiFID II, Solvency II and CRD IV.

The qualifying holdings regime sets out harmonised criteria that regulators apply in deciding whether to approve changes of control of financial institutions (i.e., credit institutions, investment firms and insurers), and important aspects of the process by which they do so. Similar requirements apply in respect of qualifying holdings in management companies under the UCITS Directive and AIFMD.

Money Market Funds Regulation

The Money Market Funds Regulation (MMF Regulation)[107] has applied from 21 July 2018. The MMR Regulation seeks to address problems with Money Market Funds (MMFs) that were identified during the financial crisis relating to the liquidity and stability of the MMF market. In particular, the MMF Regulation sets out requirements that are designed, among other things, to improve the resilience of MMFs to financial shocks and the ability of MMFs to meet redemption requests.

The MMF Regulation defines MMFs as CIUs that require authorisation as UCITS or are authorised as UCITS under UCITS IV, or are an AIF under the AIFMD; invest in short-term assets; and have distinct or cumulative objectives offering returns in line with money market rates or preserving the value of the investment.[108]

The MMF Regulation also categorises MMFs, and includes provisions on, among other things, eligibility criteria for assets in which MMFs can invest and diversification requirements.

Packaged Retail and Insurance-based Investment Products Regulation

In November 2010, the Commission identified concerns in the EU retail investment market and launched a consultation on packaged retail and insurance-based investment products (PRIIPs), which include, *inter alia*, UCITS and AIFs. It considered, among other things, that information about investments was weak and difficult to comprehend and use by consumers; there were many conflicts of interest present in the distribution of investment products; and the regulation of the market was fragmentary and inconsistent. The Commission noted that these issues created risks for consumers.[109]

Further, PRIIPs do not tend to be harmonised products at the European level and can span a range of different investment products, although their unifying feature is that they are marketed to retail customers. PRIIPS can include investment funds, insurance-based investment products, retail structured securities and structured term deposits. To address some of the concerns raised in its consultation, the Commission decided to introduce a new, pre-contractual disclosure document (a key information document (KID)) for retail consumers. The rationale was that consumers would be able to refer to the KID when considering buying a PRIIP. The Commission also decided to address this issue through cross-sectoral legislation, which would apply across various existing regulations.[110] The Packaged Retail and Insurance-based Investment Products (PRIIPs) Regulation became applicable on 1 January 2018.[111] The Commission also developed regulatory technical standards on KIDs in the delegated regulation relating to the PRIIPS Regulation, which also became applicable on 1 January 2018.[112]

The PRIIPs Regulation and related Delegated Regulation specify the form and content of the KID, favouring a simple, clear and easy to understand format. The PRIIPs Regulation also lays down rules on how to provide the KID to retail investors. It applies to PRIIP manufactures who are responsible for drawing up KIDs.[113] PRIIP manufacturers are defined as an entity that manufactures PRIIPs or makes changes to an existing PRIIP, for example, by altering its risk and reward profile. Therefore, this would capture fund managers, insurance companies, investment firms and banks. The PRIIPS Regulation

also applies to persons advising on or selling PRIIPs, who must provide the KID to retail investors.[114]

Articles 15 to 18 of the PRIIPs Regulation also provide national competent authorities and EOPIA with the power to monitor financial products under their supervision and prohibit or restrict the sale of certain products in the case of, for example, investor protection concerns or a threat to the orderly functioning and integrity of financial markets. Among other initiatives, the ESAs published technical advice on the inclusion of environmental or social objectives targeted by a PRIIP in a KID (pursuant to Article 8(4) of the PRIIPs Regulation).[115]

Securities Financing Transactions Regulation

The Securities Financing Transactions Regulation (SFTR) sets out requirements on the reporting and transparency of financing transactions. On 12 January 2016, the Securities Financing Transactions Regulation[116] came into force. It has applied, for the most part, since that date. Regulatory Technical Standards and Implementing Technical Standards supplementing the SFTR came into force on 11 April 2019.

One of the central aims of the SFTR is to enhance transparency and data availability in respect of transactions frequently undertaken in the shadow banking sector such as repurchase agreements and securities lending, commonly known as securities financing transactions (SFTs). To that end, the SFTR requires counterparties to SFTs to report details of those transactions to trade repositories. UCITS management companies and AIFMs must make certain disclosures relating to SFTs to investors in their funds, including identifying the SFTs and total return swaps that the funds in question are authorised to use. Certain information relating to SFTs must also be disclosed in UCITS's semi-annual and AIFs' annual reports to investors. The SFTR also imposes conditions on the reuse of collateral received by counterparties to SFTs, including the provision of pre-contractual information on the risks of reuse and a requirement to obtain prior express consent thereto.

EuVECAs, EuSEFs and ELTIFs

In recent years, a number of new types of investment fund have been introduced following legislative initiatives by the Commission, each, in turn, an elaboration of the AIF concept. One of those initiatives was the European Venture Capital Funds Regulation (EuVECA) Regulation,[117] which aims to strengthen the ability of venture capital funds to raise money across the European Union by creating a new brand of investment fund targeted at investors who wish to gain exposure to venture capital investments. To be an EuVECA, a fund must meet certain eligibility criteria including that it is an EU AIF that invests at least 70 per cent of its aggregate capital contributions to qualifying investments (i.e., venture capital investments).

The European Social Entrepreneurship Funds Regulation (EuSEF) Regulation[118] also created a new brand of EU AIF that, in summary, intends to invest at least 70 per cent of its aggregate capital contributions in investments that primarily aim to achieve positive social impacts. Most provisions in the EuVECA Regulation and the EuSEF Regulation have applied since 22 July 2013, the date on which Member States were required to implement the AIFMD.

The aim of the ELTIF Regulation is to create a new type of investment fund designed for investors who were prepared to make long-term investments in companies and projects in return for a steady income. To qualify as a European Long Term Investment Fund, a fund must be an EU AIF, be authorised by the competent authority in its home Member State, and comply with the rules in the ELTIF Regulation, including rules on investment policies, redemption, marketing and transparency. The ELTIF Regulation has applied since 9 December 2015.

Tax law

While the Commission has announced that it intends to publish a proposal for a common business tax rulebook for the European Union, dubbed 'BEFIT' (Business in Europe: Framework for Income Taxation), by 2023,[119] taxation remains, at present, largely a matter for the Member States. With the exception of value added tax (VAT), there is currently no centralised tax affecting asset management. Nevertheless, EU law materially impacts Member States' tax laws and, therefore, the tax treatment of asset management within the European Union.

VAT

Under the Principal VAT Directive (PVD),[120] a common system of VAT has been established in the European Union under which VAT may be chargeable in respect of goods and services supplied in the course of carrying on a business. Asset management services provided to a fund by an asset manager would normally be a service supplied in the course of carrying on a business for these purposes.

Broadly speaking, on services supplied within a Member State, VAT is chargeable on the consideration paid for such services at a rate set by the Member State. This is unless an exemption applies. Normally, the supplier (i.e., the asset manager) would have to account to the relevant tax authorities for the applicable VAT and would pass the cost on to the recipient of the supply (i.e., the fund). This is likely to be a real cost for the fund (and, ultimately, the investors) because amounts paid to suppliers in respect of VAT can only be recovered from the relevant tax authorities if the fund also makes supplies subject to VAT – which is unlikely. Therefore, from the investors' perspective, it would likely be advantageous if the asset management services fell within an exemption from VAT. (From the asset manager's perspective, that would be disadvantageous because it would mean that the asset manager makes supplies that are not subject to VAT and, therefore, the asset manager's ability to recover from the relevant tax authorities amounts that it has paid to its own suppliers in respect of VAT is limited, thereby reducing its own profit margin.)

Generally, asset management is a service subject to VAT, but there is an exemption for 'the management of special investment funds as defined by Member States'.[121] Within the confines of the objective of the PVD and the principle of fiscal neutrality, each Member State has discretion to define the scope of the special investment fund (SIF) exemption and, over the years, a number of cases have been brought in the European Courts in respect of it, demonstrating a degree of uncertainty around the scope of the SIF exemption, which is unfortunate and undesirable. If asset management services have been priced assuming a VAT treatment that later proves to be incorrect, it can be challenging to unravel the financial

impact and, to the extent that the cost of wrongly charged VAT has been borne by the fund, investors would want to ensure that the asset manager reclaims from the tax authorities any amount of VAT for which it erroneously accounted and passes any refund on to the fund.

On 8 February 2021, the Commission launched a public consultation[122] asking for feedback on the operation of the current VAT exemptions for financial and insurance services (which did not, however, expressly mention the SIF exemption). It put forward options for reform including (1) the full or partial abolition of the exemptions, or (2) their replacement with a fixed rate of input tax deduction for providers. The consultation closed on 3 May 2021, however the Commission has not yet adopted a proposal on the outcome.

Other key tax impacts of EU law

Historically, fund structures may have been set up to take advantage of the Parent Subsidiary Directive (PSD)[123] or the Interest and Royalties Directive (IRD),[124] or both, which provide for certain exemptions from withholding tax on intra-EU payments between connected parties. The Danish conduit cases[125] have, however, cast doubt on the circumstances in which taxpayers may rely on the PSD and the IRD as the Court of Justice of the European Union held that they cannot apply in the case of an abuse of rights – for instance, where a structure is set up with the intention of claiming the exemption by artificially creating the preconditions for it, such that the formal conditions of the IRD or the PSD are met, but not their purpose. The Commission has also indicated that it may seek to revive a proposal to recast the IRD to make the exemption from withholding tax conditional on the interest being subject to tax in the destination state.[126]

The freedom of establishment under Article 49 of the Treaty on the Functioning of the European Union (TFEU) and the free movement of capital under Article 63 TFEU may also become relevant in the asset management context, in particular in situations where the recipient cannot rely on the PSD. In the 2009 case *Aberdeen Property Fininvest Alpha Oy-*,[127] it was held that, under Article 49 TFEU, it was not permissible for a Member State to impose a withholding tax on dividends distributed to a parent company that is an open-ended investment company resident in another Member State if similar dividends paid to comparable domestic parent companies are not subject to such withholding tax. In other cases, it was held that Article 63 TFEU precludes the imposition of withholding tax on dividends distributed to a foreign company, UCITS or pension fund established in a different Member State if dividends distributed to a domestic company, UCITS or pension fund were not also subject to such withholding tax or, if in principle also subject to such withholding tax, were effectively exempt from it.[128] In *Emerging Markets Series of DFA Investment Trust Company v. Dyrektor Izby Skarbowej w Bydgoszczy*, it was decided that Article 63 TFEU prevents a Member State from withholding tax from dividends distributed to an investment fund established in a third country if (1) a similar withholding tax is not imposed on dividends distributed to investment funds established in that Member State and (2) there is a mutual administrative assistance obligation between that Member State and that third country that enables the tax authorities in that Member State to verify information provided by the investment fund.[129]

Article 107 of the TFEU prohibits 'state aid', meaning measures taken by a Member State to favour certain undertakings, industries or goods in a way that could distort competition and affect trade between Member States. Such measures may take the form of selective

benefits, such as subsidies, or 'interventions which, in various forms, mitigate the charges that are normally included in the budget of an undertaking'.[130] The state aid regime can apply to the tax rules of a Member State if they are, or are applied in a manner that is, 'selective' in favour of a particular undertaking, category of undertakings or category of goods. The Commission has, in particular, challenged a number of tax rulings on state aid grounds. While the General Court has ruled against the Commission on some of these challenges,[131] it is still advisable to consider the risk of potential state aid challenges, in particular where structures rely on tax rulings (or otherwise on favourable regimes).

Sustainable finance

The past couple of years have seen institutional investors play a more active role in holding companies to account and engaging in environmental, social and governance issues (ESG). In a similar vein, asset managers are increasingly expected by their clients to consider ESG in their investment decisions.

The Commission established a high-level expert group (HLEG) on sustainable finance in 2016 to prepare a blueprint for reforms to the financial sector, focusing on mobilising private capital towards sustainable investments. The Commission considered that the financial sector has a role to play in helping Member States achieve their ESG goals encapsulated in, among other initiatives, the Paris Agreement (signed on 12 December 2015) and the Sustainable Development Goals (adopted on 25 September 2015). On 31 January 2018, the HLEG published a final report with recommendations ranging from establishing a common sustainability taxonomy for financial products to clarifying investor duties for ESG and upgrading disclosure rules to make sustainability risks more transparent.[132]

The Commission published its action plan on 8 March 2018, which built on the HLEG's recommendations and set out a timetable for the implementation of its proposals.[133] On 24 May 2018, the Commission presented a package of measures that includes its main three proposals:

1. the development of an EU taxonomy for climate change and environmentally and socially sustainable activities to be able to accurately assess financial products (the Taxonomy Regulation);
2. creation of a new category of benchmarks to help investors compare the carbon footprint of their investments (the Low Carbon Benchmark Regulation); and
3. disclosure requirements and integration of ESG in investment decisions (the Disclosure Regulation).

The Low Carbon Benchmarks Regulation and the Regulation on sustainability-related disclosure in the financial services sector (the SFDR) were published in the OJ on 9 December 2019.[134] The Low Carbon Benchmark Regulation entered into force on 10 December 2019. The Disclosure Regulation entered into force on 29 December 2019, with a minority of its provisions applying from that date and 1 January 2022, and the majority applying from 10 March 2021. The Taxonomy Regulation has been fully applicable since 1 January 2023. The Commission launched a consultation in November 2020 in respect of a draft delegated regulation, supplementing the Taxonomy Regulation, which set out draft

technical screening criteria proposed for climate change mitigation and adaptation and on 27 June 2023 adopted the Environmental Delegated Act.[135] Following evaluation of the feedback received from this consultation, the EU Taxonomy Climate Delegated Act entered into force on 1 January 2022.[136]

The Commission has also adopted a draft delegated regulation that proposes to amend regulations made under MiFID II to enhance the significance of considerations of sustainability in suitability assessments.[137]

SFDR requires that investment firms and fund managers who provide portfolio management or distribute AIFs or UCITS implement a policy on the integration of sustainability and risk assessments regarding sustainability risks of investment strategies. This includes publishing on maintaining on their websites information as to their

Portfolio and fund managers are also required to assess and explain any sustainability risks relevant to the financial product it distributes - or lack thereof.[138] Furthermore, portfolio and fund managers will need to disclose whether individual financial products they distribute have a specific sustainability focus and disclose whether such financial products promote environmental or social characteristics[139] (an Article 8 product) or have sustainable investment as the financial product's primary objective (an Article 9 product).-[140] The SFDR therefore essentially requires portfolio and fund managers to give a brown, light green or dark green signifier of sustainability-related characterisation to the financial products they distribute.

In case portfolio or fund managers claim that the financial product they distribute is an Article 8 or an Article 9 product, this claim will have to be backed up by aligning the environmental or social characteristics or the sustainable investment objective with the six environmental objectives outlined in the Taxonomy Regulation (being Taxonomy-aligned). For such products, the sustainable investment objective will also be required to apply the 'do not significantly harm' principle, meaning that the sole goal of achieving the sustainable investment objective may not come at the cost of the (significant) harm to another sustainable objective.

Information on the sustainability characteristics of a financial product will need to be published on the website of the portfolio or fund manager, as well as being disclosed to investors in the pre-contractual stage (in practice, in the KIID or another similar document) and via periodic reporting to ensure that investors are informed of how the products performed from a sustainability perspective.

The ESA's published a Joint Opinion on SFDR and product classification on 18 June 2024.-[141] The Joint Opinion contains the view that the SFDR system of product classification does not engender clarity or objective indicators for investors.

Endnotes

1 The EEA comprises the Member States of the European Union and Iceland, Liechtenstein and Norway. Many European directives are extended to the non-EU Member States of the EEA by virtue of the Agreement on the European Economic Area, which came into force on 1 January 1994. New rules are adapted or extended to the EEA by decisions of the EU/EEA Joint Committee. EEA Member States outside the European Union are informed of legislative proposals, but they do not have a formal role in shaping policy. ^ Back to section

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5 Regulation 600/2014. ^ Back to section

6 Annex II Preamble, MiFID II Directive. ^ Back to section

7 Article 39(1) MiFID II. ^ Back to section

8 Article 39(2) MiFID II. ^ Back to section

9 Council Directive 85/611/EEC. ^ Back to section

10 Council Directive 2001/108/EC. ^ Back to section

11 Council Directive 2001/107/EC. ^ Back to section

12 Directive 2007/16/EC. ^ Back to section

13 Directive 2009/65/EC. ^ Back to section

14 Directive 2014/91/EU. ^ Back to section

15 Article 1(2) UCITS IV. ^ Back to section

16 Article 3(d) UCITS IV. ^ Back to section

17 Article 5 UCITS IV. ^ Back to section

18 These include regulated markets as defined in Article 4(1)(14) of MiFID, and any other regulated markets in EU Member States that operate regularly and that are recognised and open to the public. ^ Back to section

19 Provided that such exchange or market has been approved by the relevant competent authorities, or is otherwise provided for in law, in the rules of the fund or in the instrument of incorporation of the investment company (Article 50(1)(c) UCITS IV). ^ Back to section

20 Any such regulated market must operate regularly and be recognised and open to the public. The stock exchange or regulated market must also have been approved by the competent authorities, or have been provided for in law or the rules of the fund or in the instrument of incorporation of the investment company (Article 50(1)(d)(i) UCITS IV). ^ Back to section

21 Article 6(1) UCITS IV. ^ Back to section

22 Article 6(3) UCITS IV. ^ Back to section

23 Article 7(1)(a) UCITS IV. ^ Back to section

24 Article 7(1)(b) UCITS IV. ^ Back to section

25 Article 7(1)(d) UCITS IV. ^ Back to section

26 Article 7(2) UCITS IV. ^ Back to section

27 Article 8(1) UCITS IV. ^ Back to section

28 Article 8(3) UCITS IV. ^ Back to section

29 Article 10(1) UCITS IV. ^ Back to section

30 Article 12(1) UCITS IV. ^ Back to section

31 Article 12(1)(a) UCITS IV. ^ Back to section

32 Article 12(1)(b) UCITS IV. ^ Back to section

33 Article 15 UCITS IV. ^ Back to section

34 Article 16(3) UCITS IV. ^ Back to section

35 Article 17 UCITS IV. ^ Back to section

36 Articles 22 UCITS IV. ^ Back to section

37 Article 25 UCITS IV. ^ Back to section

38 Article 23(1) UCITS IV. ^ Back to section

39 Directive 2013/36/EU. ^ Back to section

40 Directive 2011/61/EU. ^ Back to section

41 These methods also apply, *mutatis mutandis*, to the merger of investment compartments of UCITS. ^ Back to section

42 Article 39(2) UCITS IV. Under Article 39(5), if the competent authorities of the merging UCITS's home Member State consider that the information provided is not complete, they may request additional information within 10 working days of receiving the original information. The merging and receiving UCITS are required to draw up common draft terms of merger under Article 40. ^ Back to section

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44 Article 58(1) UCITS IV. ^ Back to section

45 Article 59(1) UCITS IV. ^ Back to section

46 Article 58(2) UCITS IV. ^ Back to section

47 Article 58(3) UCITS IV. ^ Back to section

48 Article 68 UCITS IV. ^ Back to section

49 Article 69(1) UCITS IV. ^ Back to section

50 Article 70(1) UCITS IV. ^ Back to section

51 Article 78(5) UCITS IV. ^ Back to section

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