Regulation (EU) 2015/760 of the European Parliament and of the Council of 29 April 2015 on European long-term investment funds (Text with EEA relevance)

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of 29 April 2015

on European long-term investment funds

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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 114 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)],

Having regard to the opinion of the Committee of the Regions[(2)],

Acting in accordance with the ordinary legislative procedure[(3)],

Whereas:

(1) Long-term finance is a crucial enabling tool for putting the European economy on a path of smart, sustainable and inclusive growth, in accordance with the Europe 2020 strategy, high employment, and competitiveness for building tomorrow's economy in a way that is less prone to systemic risks and is more resilient. European long-term investment funds (ELTIFs) provide finance of lasting duration to various infrastructure projects, unlisted companies, or listed small and medium-sized enterprises (SMEs) that issue equity or debt instruments for which there is no readily identifiable buyer. By providing finance to such projects, ELTIFs contribute to the financing of the Union's real economy and the implementation of its policies.

(2) On the demand side, ELTIFs can provide a steady income stream for pension administrators, insurance companies, foundations, municipalities and other entities that face regular and recurrent liabilities and are seeking long-term returns within well-regulated structures. While providing less liquidity than investments in transferable securities, ELTIFs can provide a steady income stream for individual investors that rely on the regular cash flow that an ELTIF can produce. ELTIFs can also offer good opportunities for capital appreciation over time for those investors not receiving a steady income stream.

(3) Financing for projects such as transport infrastructure, sustainable energy generation or distribution, social infrastructure (housing or hospitals), the roll-out of new technologies

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and systems that reduce use of resources and energy, or the further growth of SMEs, can be scarce. As the financial crisis has shown, complementing bank financing with a wider variety of financing sources that better mobilise capital markets could help tackle financing gaps. ELTIFs can play a crucial role in this respect, and can also mobilise capital by attracting third-country investors.

(4) The focus of this Regulation is to boost European long-term investments in the real economy. Long- term investments in projects, undertakings, and infrastructure in third countries can also bring capital to ELTIFs and thereby benefit the European economy. Therefore, such investments should not be prevented.

(5) In the absence of a regulation setting out rules on ELTIFs, diverging measures might be adopted at national level, which are likely to cause distortions of competition resulting from differences in investment protection measures. Diverging national requirements on portfolio composition, diversification, and eligible assets, in particular investment in commodities, create obstacles to the cross-border marketing of investment funds that focus on unlisted undertakings and real assets because investors cannot easily compare the different investment propositions offered to them. Diverging national requirements also lead to different levels of investor protection. Furthermore, diverging national requirements pertaining to investment techniques, such as the permitted levels of borrowing, use of financial derivative instruments, rules applicable to short selling or to securities financing transactions, lead to discrepancies in the level of investor protection. In addition, diverging national requirements on redemption or holding periods impede the cross-border selling of funds investing in unlisted assets. By increasing legal uncertainty, those divergences can undermine the confidence of investors when considering investments in such funds and reduce the scope for investors to choose effectively between various long-term investment opportunities. Consequently, the appropriate legal basis for this Regulation is Article 114 of the Treaty on the Functioning of the European Union, as interpreted by consistent case law of the Court of Justice of the European Union.

(6) Uniform rules are necessary to ensure that ELTIFs display a coherent and stable product profile across the Union. More specifically, in order to ensure the smooth functioning of the internal market and a high level of investor protection, it is necessary to establish uniform rules regarding the operation of ELTIFs, in particular on the composition of their portfolio and the investment instruments that they are allowed to use in order to gain exposure to long-term assets, such as equity or debt instruments issued by listed SMEs and by unlisted undertakings, as well as real assets. Uniform rules on the portfolio of an ELTIF are also required to ensure that ELTIFs that aim to generate regular income maintain a diversified portfolio of investment assets suitable for maintaining a regular cash flow. ELTIFs are a first step towards creating an integrated internal market for raising capital that can be channelled towards long-term investments in the European economy. The smooth functioning of the internal market for long-term investments requires the Commission to continue its assessment of potential barriers that might stand in the way of raising long-term capital across borders, including barriers that arise from the fiscal treatment of such investments.

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(7) It is essential to ensure that the rules on the operation of ELTIFs, in particular regarding the composition of their portfolio and the investment instruments that they are allowed to use, be directly applicable to the managers of ELTIFs and, therefore, these new rules need to be adopted as a Regulation. This also ensures uniform conditions for the use of the designation 'ELTIF', by preventing the emergence of diverging national requirements. Managers of ELTIFs should follow the same rules across the Union in order to enhance the confidence of investors in ELTIFs and ensure enduring trustworthiness of the 'ELTIF' designation. At the same time, by adopting uniform rules, the complexity of the regulatory requirements applicable to ELTIFs is reduced. By means of uniform rules, the managers' cost of compliance with diverging national requirements governing funds that invest in listed and unlisted undertakings and comparable categories of real assets is also reduced. This is especially true for managers of ELTIFs that wish to raise capital on a cross-border basis. The adoption of uniform rules also contributes to the elimination of competitive distortions.

(8) The new rules on ELTIFs are closely linked to Directive 2011/61/EU of the European Parliament and of the Council[(4)], since that Directive forms the legal framework governing the management and marketing of alternative investment funds (AIFs) in the Union. By definition, ELTIFs are EU AIFs that are managed by alternative investment fund managers (AIFMs) authorised in accordance with Directive 2011/61/EU.

(9) Whereas Directive 2011/61/EU also provides for a staged third-country regime governing non-EU AIFMs and non-EU AIFs, the new rules on ELTIFs have a more limited scope emphasising the European dimension of the new long-term investment product. Accordingly, only an EU AIF as defined in Directive 2011/61/EU should be eligible to become an ELTIF and only if it is managed by an EU AIFM that has been authorised in accordance with Directive 2011/61/EU.

(10) The new rules applicable to ELTIFs should build on the existing regulatory framework established by Directive 2011/61/EU and the acts adopted for its implementation. Therefore, the product rules concerning ELTIFs should apply in addition to the rules laid down in existing Union law. In particular, the management and marketing rules laid down in Directive 2011/61/EU should apply to ELTIFs. Equally, the rules on the cross-border provision of services and freedom of establishment laid down in Directive 2011/61/EU should apply correspondingly to the cross-border activities of ELTIFs. These should be supplemented by specific marketing rules designed for the cross-border marketing of ELTIFs to both retail and professional investors across the Union.

(11) Uniform rules should apply to all EU AIFs that wish to market themselves as ELTIFs. EU AIFs that do not wish to market themselves as ELTIFs should not be bound by these rules, thereby also accepting that they do not benefit from the advantages that ensue. Undertakings for collective investment in transferable securities (UCITS) and non-EU AIFs should not be eligible for marketing as ELTIFs.

(12) In order to ensure the compliance of ELTIFs with the harmonised rules governing the activity of these funds, it is necessary to require competent authorities to authorise ELTIFs. The harmonised authorisation and supervision procedures for AIFMs under Directive 2011/61/EU should therefore be supplemented with a special authorisation

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procedure for ELTIFs. Procedures should be put in place to ensure that only EU AIFMs authorised in accordance with Directive 2011/61/EU and capable of managing an ELTIF may manage ELTIFs. All appropriate steps should be taken to ensure that an ELTIF will be able to comply with the harmonised rules governing the activity of these funds. A specific authorisation procedure should apply where the ELTIF is internally managed and no external AIFM is appointed.

(13) Given that EU AIFs may take different legal forms that do not necessarily endow them with legal personality, the provisions requiring ELTIFs to take action should be understood to refer to the manager of the ELTIF in cases where the ELTIF is constituted as an EU AIF that is not in a position to act by itself because it has no legal personality of its own.

(14) In order to ensure that ELTIFs target long-term investments and contribute to the financing of a sustainable growth of the Union's economy, rules on the portfolio of ELTIFs should require the clear identification of the categories of assets that are eligible for investment by ELTIFs, and of the conditions under which they should be eligible. An ELTIF should invest at least 70 % of its capital in eligible investment assets. In order to ensure the integrity of ELTIFs, it is also desirable to prohibit an ELTIF from engaging in certain financial transactions that might endanger its investment strategy and objectives by giving rise to risks that are different from those that might be expected for a fund targeting long-term investments. In order to ensure a clear focus on long-term investments, as may be useful for retail investors unfamiliar with less conventional investment strategies, an ELTIF should not be allowed to invest in financial derivative instruments other than for the purpose of hedging the risks inherent to its own investments. Given the liquid nature of commodities and the financial derivative instruments that give an indirect exposure to them, investments in commodities do not require a long-term investor commitment and therefore should be excluded from eligible investment assets. That rationale does not apply to investments in infrastructure or companies related to commodities or whose performance is linked indirectly to the performance of commodities, such as farms in the case of agricultural commodities or power plants in the case of energy commodities.

(15) The definition of what constitutes a long-term investment is broad. Eligible investment assets are generally illiquid, require commitments for a certain period of time, and have an economic profile of a long-term nature. Eligible investment assets are non-transferable securities and therefore do not have access to the liquidity of secondary markets. They often require fixed term commitments which restrict their marketability. Nevertheless, as listed SMEs may face problems of liquidity and access to the secondary market, they should also be considered to be qualifying portfolio undertakings. The economic cycle of the investment sought by ELTIFs is essentially of a long-term nature due to the high capital commitments and the length of time required to produce returns.

(16) An ELTIF should be allowed to invest in assets other than eligible investment assets as may be necessary to manage its cash flow efficiently, but only so long as this is consistent with the ELTIF's long-term investment strategy.

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(17) Eligible investment assets should be understood to include participations, such as equity or quasi-equity instruments, debt instruments in qualifying portfolio undertakings, and loans provided to them. They should also include participations in other funds that are focused on assets, such as investments in unlisted undertakings that issue equity or debt instruments for which there is not always a readily identifiable buyer. Direct holdings of real assets, unless they are securitised, should also form a category of eligible assets, provided that they yield a predictable cash flow, whether regular or irregular, in the sense that they can be modelled and valued based on a discounted cash flow valuation method. Those assets could indicatively include social infrastructure that yields a predictable return, such as energy, transport and communication infrastructure, as well as education, health, welfare support or industrial facilities. Conversely, assets such as works of art, manuscripts, wine stocks or jewellery should not be eligible as they do not normally yield a predictable cash flow.

(18) Eligible investment assets should include real assets with a value of more than EUR 10 000 000 that generate an economic and social benefit. Such assets include infrastructure, intellectual property, vessels, equipment, machinery, aircraft or rolling stock, and immovable property. Investments in commercial property or housing should be permitted to the extent that they serve the purpose of contributing to smart, sustainable and inclusive growth or to the Union's energy, regional and cohesion policies. Investments in such immovable property should be clearly documented so as to demonstrate the long-term commitment in the property. This Regulation is not seeking to promote speculative investments.

(19) The scale of infrastructure projects means that they require large amounts of capital to remain invested for long periods of time. Such infrastructure projects include public building infrastructure such as schools, hospitals or prisons, social infrastructure such as social housing, transport infrastructure such as roads, mass transit systems or airports, energy infrastructure such as energy grids, climate adaptation and mitigation projects, power plants or pipelines, water management infrastructure such as water supply systems, sewage or irrigation systems, communication infrastructure such as networks, and waste management infrastructure such as recycling or collection systems.

(20) Quasi-equity instruments should be understood to comprise a type of financing instrument which is a combination of equity and debt, where the return on the instrument is linked to the profit or loss of the qualifying portfolio undertaking and where the repayment of the instrument in the event of default is not fully secured. Such instruments include a variety of financing instruments such as subordinated loans, silent participations, participating loans, profit participating rights, convertible bonds and bonds with warrants.

(21) To reflect existing business practices, an ELTIF should be allowed to buy existing shares of a qualifying portfolio undertaking from existing shareholders of that undertaking. In addition, for the purposes of ensuring the widest possible opportunities for fundraising, investments in other ELTIFs, European Venture Capital Funds (EuVECAs), regulated by Regulation (EU) No 345/2013 of the European Parliament and of the Council[(5)], and European Social Entrepreneurship Funds (EuSEFs), regulated by Regulation (EU) No