Directive (EU) 2019/1160 of the European Parliament and of the Council of 20 June 2019 amending Directives 2009/65/EC and 2011/61/EU with regard to cross-border distribution of collective investment undertakings (Text with EEA relevance)

DIRECTIVE (EU) 2019/1160 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 20 June 2019

amending Directives 2009/65/EC and 2011/61/EU with regard to cross-border distribution of collective investment undertakings

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

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

Having regard to the proposal from the European Commission,

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

Having regard to the opinion of the European Economic and Social Committee[(1)],

Acting in accordance with the ordinary legislative procedure[(2)],

Whereas:

(1) Common objectives of Directive 2009/65/EC of the European Parliament and of the Council[(3)] and Directive 2011/61/EU of the European Parliament and of the Council[(4)] include ensuring a level playing field among collective investment undertakings and removing restrictions to the free movement of units and shares of collective investment undertakings in the Union, at the same time ensuring more uniform protection for investors. While those objectives have been largely achieved, certain barriers still hamper the ability of fund managers to fully benefit from the internal market.

(2) This Directive is complemented by Regulation (EU) 2019/1156 of the European Parliament and of the Council[(5)]. That Regulation lays down additional rules and procedures concerning undertakings for collective investment in transferable securities (UCITS) and alternative investment fund managers (AIFMs). That Regulation and this Directive should collectively further coordinate the conditions for fund managers operating in the internal market and facilitate cross-border distribution of the funds they manage.

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

(4) Regulation (EU) 2019/1156 further strengthens the principles applicable to marketing communications governed by Directive 2009/65/EC and extends the application of

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those principles to AIFMs, thereby resulting in a high standard of investor protection, regardless of the type of investor. The corresponding provisions of Directive 2009/65/EC relating to marketing communications and accessibility of national laws and regulations relevant to the arrangement of marketing units of UCITS are therefore no longer necessary and should be deleted.

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

(6) In order to ensure the consistent treatment of retail investors, it is necessary that the requirements relating to facilities be also applied to AIFMs where Member States allow them to market units or shares of alternative investment funds (AIFs) to retail investors in their territories.

(7) The absence of clear and uniform conditions for the discontinuation of marketing of units or shares of a UCITS or an AIF in a host Member State creates economic and legal uncertainty for fund managers. Therefore, Directives 2009/65/EC and 2011/61/EU should set out clear conditions under which de-notification of the arrangements made for marketing as regards some or all of the units or shares could take place. Those conditions should balance, on the one hand, the ability of collective investment undertakings or their managers to terminate their arrangements made for marketing of their shares or units when the established conditions are met and, on the other hand, the interests of investors in such undertakings.

(8) The possibility to cease marketing UCITS or AIFs in a particular Member State should neither come at a cost to investors nor diminish their safeguards under Directive 2009/65/EC or Directive 2011/61/EU, in particular with regard to their right to accurate information on the continued activities of those funds.

(9) There are cases where an AIFM wishing to test investor appetite for a particular investment idea or investment strategy is faced with diverging treatment of pre-marketing in different national legal systems. The definition of pre-marketing and the conditions under which it is permitted vary considerably between those Member States in which it is permitted, whereas in other Member States there is no concept of pre-marketing at all. To address those divergences, a harmonised definition of pre-marketing should be provided and the conditions under which an EU AIFM can engage in pre-marketing should be established.

(10) For pre-marketing to be recognised as such under Directive 2011/61/EU, it should be addressed to potential professional investors and concern an investment idea or investment strategy in order to test their interest in an AIF or a compartment which is not yet established, or which is established, but not yet notified for marketing in accordance with that Directive. Accordingly, during the course of pre-marketing, it should not be possible for investors to subscribe to the units or shares of an AIF and the distribution of subscription forms or similar documents to potential professional investors, whether in draft or final form, should not be permitted. EU AIFMs should ensure that investors do not acquire units or shares in an AIF through pre-marketing and that investors contacted as part of pre-marketing can only acquire units or shares in that AIF through marketing permitted under Directive 2011/61/EU.
Any subscription by professional investors, within 18 months of the EU AIFM having begun pre-marketing, to units or shares of an AIF referred to in the information provided in the context of pre-marketing, or of an AIF established as a result of the pre-marketing, should be considered to be the result of marketing and should be subject to the applicable notification procedures referred to in Directive 2011/61/EU. To ensure that national competent authorities can exercise control over pre-marketing in their Member State, an EU AIFM should send, within two weeks of having begun pre-marketing, an informal letter, in paper form or by electronic means, to the competent authorities of its home Member State, specifying inter alia in which Member States it is or has engaged in pre-marketing, the periods during which the pre-marketing is taking or has taken place and including, where relevant, a list of its AIFs and compartments of AIFs which are or were the subject of pre-marketing. The competent authorities of the home Member State of the EU AIFM should promptly inform the competent authorities of the Member States in which the EU AIFM is or has engaged in pre-marketing thereof.

(11) EU AIFMs should ensure that their pre-marketing is adequately documented.

(12) National laws, regulations and administrative provisions necessary to comply with Directive 2011/61/EU and, in particular, with harmonised rules on pre-marketing, should not in any way disadvantage EU AIFMs vis-à-vis non-EU AIFMs. This concerns both the current situation in which non-EU AIFMs do not have passporting rights, and a situation in which the provisions on such passporting in Directive 2011/61/EU become applicable.

(13) In order to ensure legal certainty, it is necessary to synchronise the application dates of national laws, regulations and administrative provisions implementing this Directive and Regulation (EU) 2019/1156 with regard to relevant provisions on marketing communications and pre-marketing.

(14) In accordance with the Joint Political Declaration of 28 September 2011 of Member States and the Commission on explanatory documents[(6)], Member States have undertaken to accompany, in justified cases, the notification of their transposition measures with one or more documents explaining the relationship between the components of a directive and the corresponding parts of national transposition instruments. With regard to this Directive, the legislator considers the transmission of such documents to be justified,

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HAVE ADOPTED THIS DIRECTIVE:

Article 1

Amendments to Directive 2009/65/EC

Directive 2009/65/EC is amended as follows:

(1) in Article 17(8), the following subparagraphs are added:

> Where, pursuant to a change as referred to in the first subparagraph, the management company would no longer comply with this Directive, the competent authorities of the management company's home Member State shall inform the management company within 15 working days of receipt of all the information referred to in the first subparagraph that it is not to implement that change. In that case, the competent authorities of the management company's home Member State shall inform the competent authorities of the management company's host Member State accordingly.
>
> Where a change referred to in the first subparagraph is implemented after information has been transmitted in accordance with the second subparagraph and pursuant to that change the management company no longer complies with this Directive, the competent authorities of the management company's home Member State shall take all appropriate measures in accordance with Article 98 and shall notify the competent authorities of the management company's host Member State without undue delay of the measures taken.;

(2) Article 77 is deleted;

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

(4) Article 92 is replaced by the following:

Article 92

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

- a process subscription, repurchase and redemption orders and make other payments to unit-holders relating to the units of the UCITS, in accordance with the conditions set out in the documents required pursuant to Chapter IX;
- b provide investors with information on how orders referred to in point (a) can be made and how repurchase and redemption proceeds are paid;
- c facilitate the handling of information and access to procedures and arrangements referred to in Article 15 relating to the investors' exercise of their rights arising from their investment in the UCITS in the Member State where the UCITS is marketed;
- d make the information and documents required pursuant to Chapter IX available to investors under the conditions laid down in Article 94, for the purposes of inspection and obtaining copies thereof;
- e provide investors with information relevant to the tasks that the facilities perform in a durable medium; and
- f act as a contact point for communicating with the competent authorities.

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

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

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

b by the UCITS itself, by a third party which is subject to regulation and supervision governing the tasks to be performed, or by both.

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

(5) Article 93 is amended as follows:

(a) in paragraph 1, the following subparagraph is added:

The notification letter shall also include the details necessary, including the address, for the invoicing or for the communication of any applicable regulatory fees or charges by the competent authorities of the host Member State and information on the facilities for performing the tasks referred to in Article 92(1).;

(b) paragraph 8 is replaced by the following:

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

Where, pursuant to a change as referred to in the first subparagraph, the UCITS would no longer comply with this Directive, the competent authorities of the UCITS home Member State shall inform the UCITS within 15 working days of receipt of all the information referred to in the first subparagraph that it is not to implement that change. In that case, the competent authorities of the UCITS home Member State shall notify the competent authorities of the UCITS host Member State accordingly.

Where a change referred to in the first subparagraph is implemented after information has been transmitted in accordance with the second subparagraph and pursuant to that change the UCITS no longer complies with this Directive, the competent authorities of the home Member State of the UCITS shall take all appropriate measures in accordance with Article 98, including, where necessary, the express prohibition of marketing of the UCITS and shall notify the competent authorities of the UCITS host Member State without undue delay of the measures taken.;

(6) the following article is inserted:

Article 93a

1 Member States shall ensure that a UCITS may de-notify arrangements made for marketing as regards units, including, where relevant, in respect of share classes,