



Brussels, 15.12.2023
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COMMISSION DELEGATED REGULATION (EU) .../...

of 15.12.2023

supplementing Directive 2009/65/EC of the European Parliament and of the Council with regard to regulatory technical standards specifying the information to be notified in relation to the cross-border activities of management companies and undertakings for collective investment in transferable securities (UCITS)

(Text with EEA relevance)

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE DELEGATED ACT

Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (the UCITS Directive)¹ contains provisions allowing the management companies of undertakings for collective investment in transferable securities (UCITS) to market the units or shares of UCITS that they manage in host Member States.

The UCITS Directive also allows management companies to carry out their activities in host Member States under the freedom of establishment and / or the freedom to provide services.

In order to foster convergence and to standardise the transmission of notifications for cross-border marketing and the cross-border management activities of UCITS throughout the EU, the UCITS Directive contains provisions mandating the European Securities and Markets Authority (ESMA) to develop draft regulatory technical standards (RTS) and draft implementing technical standards (ITS) for the exchange of information and related communication between national competent authorities (NCAs). These RTS and ITS should specify the information to be provided, as well as the content and format of notification letters that management companies submit to NCAs if they wish to undertake cross-border marketing or cross-border management activities and to provide services in host Member States. The RTS and ITS should also further specify the procedure for the communication of the notification file by the relevant home NCA to the host NCA of the Member States where these activities are envisaged.

2. CONSULTATIONS PRIOR TO THE ADOPTION OF THE ACT

On 17 May 2022, ESMA published a Consultation Paper on the proposed draft RTS and ITS. The public consultation closed on 9 September 2022.

ESMA received eight responses, six from asset managers and their associations, one from an independent advisory firm and one from a public body. The respondents to the consultation generally welcomed the draft. Some respondents suggested changes to the content of the forms that had been developed. The respondents commented on the possible costs of this standardisation and the regular updates that are to be provided. Another issue was the divergence in communication channels that the NCAs offer to their respective asset managers. The detailed content of these responses and ESMA's feedback are outlined in the feedback section of ESMA's final report on draft technical standards on the notifications for cross-border marketing and cross-border management of AIFs and UCITS that is available on ESMA's website².

3. LEGAL ELEMENTS OF THE DELEGATED ACT

The obligation for the Commission to adopt level 2 measures (delegated acts) on marketing communication derives from Article 4 of Regulation (EU) 2019/1156 of the European Parliament and of the Council of 20 June 2019 on facilitating cross-border distribution of collective investment undertakings and amending Regulations (EU) No 345/2013, (EU) No 346/2013 and (EU) No 1286/2014 (the CBDF Regulation). The CBDF Regulation

¹ OJ L 302, 17.11.2009, p. 32.

² ESMA document number: ESMA 34-45-1648 of 15 December 2022.

should be read in conjunction with Directive 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 (the CBDF Directive), which is an amending directive for both the UCITS Directive and the alternative investment funds managers Directive (AIFMD)³. Both texts regulate the same procedures concerning cross-border notifications and de-notifications by management companies and alternative investment fund managers (AIFMs).

The empowerments to adopt further RTS is in the UCITS Directive⁴ rather than in the CBDF Directive itself. The notification procedures designed in this Delegated Regulation are intended to remain as closely aligned as possible for UCITS and alternative investment fund (AIF) products in order to ensure fast and consistent communication between NCAs. Since the empowerments for the RTS are not combined in one Level 1 act but split into two different Directives, it is however legally not advisable to combine the respective rules in one single RTS. Other than originally suggested by ESMA, the Commission will therefore generate two different sets of RTS and ITS, one under the AIFMD and one under the UCITS Directive.

³ Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010 (OJ L 174, 1.7.2011, p. 1).

⁴ Articles 17(10), 18(5) and 20(5) of the UCITS Directive.

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(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS)⁵, and in particular Article 17(10), second subparagraph, Article 18(5), second subparagraph, and Article 20(5), second subparagraph thereof,

Whereas:

- (1) The scope and content of the information to be notified to competent authorities under Article 17(1), (2), (3), (8) and (9), Article 18(1), (2) and (4), and Article 20(1) and (4) of Directive 2009/65/EC, vary depending on the purpose and form of the notification. It is therefore appropriate to specify the information to be notified by undertakings for collective investment in transferable securities and by management companies of undertakings for collective investment in transferable securities ('management companies') for each type of notification.
- (2) To ensure that competent authorities are at all times informed of the activities of management companies and to enable competent authorities to properly exercise their supervisory powers, they should be informed about every change in the notified information. That includes any withdrawal of, cancellation of, or change to the authorisation initially granted to a management company.
- (3) The International Securities Identification Number (ISIN) and the Legal Entity Identifier (LEI) of the UCITS are extremely important to enable a unique identification of the UCITS by electronic means. This Regulation therefore includes the mandatory notification of the ISIN and the LEI where they have been assigned to the UCITS and are therefore available.
- (4) The competent authorities should be provided with information about persons responsible for the management of the branch and their contact details. Persons should be considered responsible for the management of the branch if they have the empowerment to set the branch's strategy, objectives, and overall direction, to effectively direct the business of the branch or if they are responsible for the day-to-day business of the branch in a managerial capacity. To avoid any gaps, it should be

⁵ OJ L 302, 17.11.2009, p. 32.

ensured that for every part of the branch's activities, business areas and management functions, the persons in the respective leading position are notified.

- (5) This Regulation is based on draft regulatory technical standards submitted to the Commission by the European Securities and Markets Authority.
- (6) The European Securities and Markets Authority has conducted open public consultations on the draft regulatory technical standards on which this Regulation is based, analysed the potential related costs and benefits, and requested the advice of the Securities and Markets Stakeholder Group that was established in accordance with Article 37 of Regulation (EU) 1095/2010 of the European Parliament and of the Council⁶.
- (7) The provisions in this Regulation are closely linked since they deal with the form and content of the information to be exchanged between management companies and the national competent authorities of home and host Member States where the management company intends to provide cross-border services. To ensure coherence between those provisions, which should enter into force at the same time, and to facilitate a comprehensive view and efficient access for management companies and national competent authorities, it is appropriate to include them in a single regulation.
- (8) This Regulation respects the fundamental rights and observes the principles recognised by the Charter of Fundamental Rights of the European Union, and notably the right of protection of personal data. The processing of personal data in the context of this Regulation shall comply with Regulation (EU) 2016/679⁷.
- (9) The European Data Protection Supervisor was consulted in accordance with Article 42 of Regulation (EU) 2018/1725⁸ and delivered an opinion on 10.10.2023.
- (10) To enable management companies and competent authorities to adapt to the new requirements laid down in this Regulation, it is appropriate to defer its application,

HAS ADOPTED THIS REGULATION:

Article 1

Information to be provided under Article 17(1) and (2) of Directive 2009/65/EC

1. The information that management companies are to provide under Article 17(1) of Directive 2009/65/EC shall contain all the following:
 - (a) the name, address, LEI and contact details of the management company;

⁶ Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC (OJ L 331, 15.12.2010, p. 84).

⁷ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (OJ L 119, 4.5.2016, p. 1).

⁸ Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC (OJ L 295, 21.11.2018, p. 39).

- (b) the name and contact details of the department or contact point at the management company that is responsible for exchanging the information with the competent authority of the management company's home Member State.
2. The description of the activities and services to be included in the programme of operations that management companies are to communicate under Article 17(2), point (b), of Directive 2009/65/EC shall contain all the following:
- (a) the particular activities and services referred to in Article 6(2) and (3) of Directive 2009/65/EC that will be provided in the host Member State;
 - (b) whether the management company is a member of a group;
 - (c) an explanation of how the branch will contribute to the strategy of the management company, or the management company's group;
 - (d) a description of the business strategy of the branch;
 - (e) forecast statements of the branch for both, profit or loss and cash flow, for the first 36 months.
3. The description of the organisational structure of the branch to be included in the programme of operations that management companies are to communicate under Article 17(2), point (b), of Directive 2009/65/EC shall contain all the following:
- (a) functional, geographical, and legal reporting lines;
 - (b) a description of how the branch fits into the internal structure of the management company, or, where the management company is a member of a group, into the internal structure of the group, including details about any operational unit put in place at the level of the branch and an indication of the human resources allocated to the branch;
 - (c) the rules for reporting by the branch to the management company;
 - (d) a description of the risk measurement and management process put in place by the management company at the level of the branch under Articles 40 to 43 of Commission Directive 2010/43/EU⁹;
 - (e) a description of the procedures and arrangements taken in accordance with Article 15 of Directive 2009/65/EC;
 - (f) a summary of the systems and controls put in place by the management company at the level of the branch, including all the following:
 - (i) procedures put in place, and the human and material resources allocated, to comply with the rules drawn up by the management company's host Member State pursuant to Article 14 of Directive 2009/65/EC;
 - (ii) procedures put in place, and the human and material resources allocated, to comply with the anti-money laundering and counter financing of terrorism obligations laid down in Directive (EU) 2015/849 of the European Parliament and of the Council¹⁰;

⁹ Commission Directive 2010/43/EU of 1 July 2010 implementing Directive 2009/65/EC of the European Parliament and of the Council as regards organisational requirements, conflicts of interest, conduct of business, risk management and content of the agreement between a depositary and a management company (OJ L 176, 10.7.2010, p. 42).

¹⁰ Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending

- (iii) controls over delegation arrangements with respect to activities conducted by the branch in the host Member State.
4. The information that management companies are to provide under Article 17(2), point (d), of Directive 2009/65/EC about the persons responsible for the management of the branch shall contain the name, position, email address and telephone number of individuals performing key functions in a leading position in relation to the branch.

Article 2

Information to be communicated under Article 18(1) and (2) of Directive 2009/65/EC

1. The information that management companies are to communicate under Article 18(1), point (a), of Directive 2009/65/EC shall contain all the following:
 - (a) the name, address, LEI and contact details of the management company;
 - (b) the name and contact details of the department or contact point at the management company that is responsible for exchanging information with the competent authority of the management company's home Member State.
2. The description of the services and activities to be included in the programme of operations that management companies are to communicate under Article 18(1), point (b), of Directive 2009/65/EC shall contain all the following:
 - (a) the particular activities and services referred to in Article 6(2) and (3) of Directive 2009/65/EC that will be provided in the host Member State;
 - (b) whether the management company is a member of a group;
 - (c) an explanation of how the activities to be conducted in the host Member State will contribute to the strategy of the management company, or the management company's group.

Article 3

Information to be provided under Article 20(1), point (b), of Directive 2009/65/EC

The information that management companies are to provide under Article 20(1), point (b), of Directive 2009/65/EC shall contain all the following:

- (a) a list of investment management or administration functions subject to delegation;
- (b) the name, address and contact details of the delegate.

Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC (OJ L 141, 5.6.2015, p. 73).

Article 4

Notification of any change to the information provided under Article 17(1), (2), (3), (8) and (9), Article 18(1), (2) and (4), and Article 20(1) and (4) of Directive 2009/65/EC

1. Management companies shall inform the competent authorities concerned about any change to the information referred to in Articles 1 to 3.
2. Management companies shall inform the competent authorities concerned about the planned termination of the operation of a branch established in another Member State, and shall provide those competent authorities with all the following information:
 - (a) the name, e-mail address and telephone number of the person or persons who will be responsible for the process of terminating the operation of the branch;
 - (b) the schedule for the planned termination;
 - (c) the details of and processes proposed for winding down the business operations, including details about how investor interests will be protected, complaints will be resolved, and any outstanding liabilities will be discharged.

Article 5

Entry into force and application

This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

This Regulation shall apply from ... [PO please insert the date = 3 months after the publication in the OJ].

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 15.12.2023

For the Commission
The President
Ursula VON DER LEYEN