

A large green square graphic with a white border, containing the text "UCITS IV - Cross-Border Notifications" in white.

UCITS IV - Cross-Border Notifications

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UCITS IV - CROSS-BORDER NOTIFICATIONS

Introduction

Under the existing legal and regulatory framework, UCITS established in one Member State of the EU may market their units in another EU State subject to certain notification and filing requirements. However, the cross-border marketing passport is currently subject to certain administrative obstacles which includes *inter alia* the requirement to translate key fund documents and, in a number of Member States, a two-month notification period before a UCITS can commence marketing in the host Member State. In addition, the specific registration requirements regarding inward marketing of UCITS differ from Member State to Member State.

Directive 2009/65/EC (the “**UCITS IV Directive**”) aims to facilitate greater distribution of UCITS by improved efficiencies in the distribution of UCITS and by eliminating as far as possible, existing administrative barriers. The UCITS IV Directive provides that a UCITS will be able to market its units within their territories upon notification in accordance with certain specific procedures. Given the aim of the UCITS IV Directive is to remove administrative barriers to the marketing of UCITS, Member States are prohibited from imposing any additional notification requirements other than those provided in the UCITS IV Directive¹.

In summary, the existing cross-border marketing provisions will be replaced with a more simplified Regulator- to-Regulator notification. This will permit a UCITS to begin marketing its units in another Member State (the “**Host Member State**”) no later than 10 working days after the date of receipt of the required standard notification letter accompanied by complete documentation required in the application. It also greatly simplifies the documentation required, and significantly the only document which requires translation in the language of the Host Member State is the key investor information document (“**KII**”).

The notification procedures in the UCITS IV Directive have been broadly welcomed by the European funds industry as it is believed that they will improve administrative efficiency and facilitate more efficient marketing and reduce translation costs.

The specific cross-border notification requirements are dealt with below.

¹ Article 91(2)

Standard Model Notification Letter and Attestation

Under the UCITS IV Directive, if a UCITS proposes to market its units in a Member State other than its Home Member State, it shall first submit a completed standard model notification letter to its Home Regulator. The form and content of the notification letter is set out in the UCITS IV Directive².

The standard model notification letter (together with its attachments, the “**Notification File**”) requires the UCITS to complete details with respect to:-

- ▣ its legal form;
- ▣ its management company (where applicable);
- ▣ the arrangements made for marketing the UCITS in the Host Member State;
- ▣ the arrangements made for the provision of payment facilities to unitholders in the Host Member State; and
- ▣ the arrangement made to make available the information which UCITS are required to provide to unitholders under the UCITS IV Directive.

The UCITS must attach to the notification letter, the latest versions of (i) its constitutional documents; (ii) its prospectus; (iii) its KII; (iv) its annual report and any subsequent half yearly report.

Significantly, the only document in the Notification File which is required to be translated is the KII which must be translated into the official language of the Host Member State. The UCITS IV Directive requires that the notification letter and attestation are provided “in a language customary in the sphere of international finance” unless the Home and Host Member States agree to it being in the official language of both states Article 93 (4). Therefore, the decision to translate the other fund documents rests with the UCITS. In practice, whether or not other key fund documents such as the prospectus are translated will depend on specific marketing considerations.

² Article 93

An important point to note is that the Host Member States cannot require the Host Regulator to require any additional documents or certifications³.

The UCITS IV Directive also provides for a standard model attestation to be completed by the Home Regulator for the purpose of confirming to the Host Regulator the date of establishment of the UCITS, its legal form, the list of sub-funds currently approved by the Home Regulator and confirmation that the UCITS fulfils the conditions set out in the UCITS IV Directive.

The Home Regulator must verify the completeness of the Notification File and transmit it by email together with the attestation to the Host Regulator within 10 working days of receipt of the documentation from the UCITS. Following the successful transmission of the Notification File, the Home Regulator shall immediately notify the UCITS and the UCITS may access the market of the Host Regulator from the date of the notification.

With regard to ongoing obligations, the Home Regulator will be under an obligation to ensure that the UCITS keeps the documents submitted to it (together with any translations thereof) up to date. The UCITS must notify the Host Regulator of any amendments to the key fund documents (i.e. prospectus, KII, constitutional documents) and indicate where these documents can be obtained electronically. In addition, the UCITS is required to give advance written notice of any changes to the arrangements made for marketing its units or any changes regarding the unit classes to be marketed in the Host Member State. It is therefore important to note that the UCITS IV Directive does not facilitate a Regulator-to-Regulator notification in respect of amendments to fund documentation and instead this responsibility rests with the UCITS.

Transmission and Receipt of the Notification File

The UCITS IV Directive sets out conditions and procedures regarding Regulator to Regulator electronic communication. Each Member State must designate an email address which it will use and check daily with respect to the transmission of Notification Files and the exchange of information related to the notification procedure and Member States shall notify each other of this address.

The recital to the Commission Regulation 548/2010 implementing the UCITS IV Directive states that in order to ensure legal certainty, it is important to establish when the transmission of the complete notification is deemed to have taken place. This requires the

³ Article 93(b)

Home State Regulator to ensure electronic transmission has taken place. The Host Regulator must confirm (via the Home Regulator's designated e-mail address) receipt of the Notification File no later than five working days from the date of the receipt of same, regardless of whether all attachments have been received or whether they can be viewed or printed. Where such confirmation has not issued within the prescribed time limit, the Home Regulator shall contact the Host Regulator to verify that the transmission has taken place.

The transmission of the Notification File shall not be considered as having taken place where (i) an attachment is missing, incomplete or is in an unacceptable format; (ii) the Home Regulator does not use the Host Regulator's designated e-mail address; or (iii) there has been a technical failure in Home Regulator's electronic system. In such instances the Home Regulator must immediately take steps to ensure successful transmission.

Supervisory Cooperation

Another objective of the UCITS IV Directive is to enhance co-operation between Member State Regulators to ensure the smooth implementation of the rules and consistency of approach and interpretation throughout the European Union. Accordingly, the UCITS IV Directive endeavours to strengthen existing information sharing mechanisms between Member State Regulators by allowing the Regulator in one Member State to carry out on-the-spot verification of information and investigations within the territory of another Member State or have the Regulator in another Member State carry out such checks. The Regulations set out the necessary administrative and organisational measures that Member States must take to facilitate such cooperation.

(a) Procedures for on-the-spot verifications and investigations

Pursuant to the provisions of the UCITS IV Directive, a Member State Regulator has a right to request the co-operation of another Member State Regulator with respect to matters falling within the scope of its supervisory responsibilities. In this regard, the UCITS IV Directive provides that the Regulator in one Member State (the "**Requesting Regulator**") may request the cooperation of the Regulator of another Member State (the "**Requested Regulator**") in a supervisory activity or for an on-the-spot verification or in an investigation on the territory of the latter. This would arise for example, where a UCITS domiciled in one Member State is managed by a management company domiciled and regulated by a Regulator in another Member State or where a management company has delegated certain activities to service providers in other Member States. The Requested Regulator should provide assistance even where the conduct under investigation is not considered an infringement in its own jurisdiction.

(b) Request for assistance with respect to on-the-spot verifications, investigations and interviews

The UCITS IV Directive provides for a specific procedure which must be followed when the Requesting Regulator is seeking assistance from the Requested Regulator with respect to on-the-spot verifications and investigations. This procedure includes a requirement by the Requesting Regulator to specify the grounds for the request, the relevant local legal provisions, actions to be taken and the scope of such investigation. The UCITS IV Directive also facilitates requests for assistance in interviews with persons situated in the Requested Regulator's Member State. The Requested Regulator is required to facilitate and provide assistance to the Requesting Regulator and both Regulators may agree matters relating to the allocation of costs of verification, investigation or interview.

The Requested Regulator shall decide whether it carries out the verification (in which case the Requesting Regulator may request its own officials to attend and participate in the investigation), investigation or interview itself or whether it allows the Requesting Regulator, auditors or other experts to do so.

(c) Carrying out of the verification, investigation and interview

The verification or investigation must be carried out in accordance with the procedure provided for in the law of the Member State on whose territory the verification or investigation is to be conducted. Where the Requested Regulator has allowed the Requesting Regulator, auditors or other experts to carry out the verification or investigation, it shall provide the necessary assistance to facilitate the verification or investigation. If, whilst carrying out on-the-spot verification or investigation the Requesting Regulator, auditors or experts discover material information relevant for the discharging of duties of the Requested Regulator, they shall transmit this information promptly to the Requested Regulator. With respect to interviews, the Requesting Regulator may take part in the interviews requested and may submit questions to be asked before and during the interviews.

(d) Cooperation between the Management Company's Home Regulator and the UCITS Home Regulator with respect to verifications and investigations

The UCITS IV Directive also sets out provisions for Regulator-to-Regulator notification in respect of any verifications and investigations to be undertaken with regard to the management company or the UCITS.

In addition, the management company's Home Regulator may request the assistance of the UCITS Home Regulator with regard to the verification and investigation of a depositary of a UCITS where it is necessary to discharge its supervisory duties of the management company.

The UCITS IV Directive also provides for procedures to be put in place between the Regulators with regard to sharing the results of any investigations or agreeing on further actions to be taken with regard to on-site verification or investigation. The management company's Home Regulator shall agree on the procedures for sharing the results of the verification and investigations carried out with respect to the management company and the UCITS that are subject to their supervision.

(e) Routine exchange of information

There are also certain generic requirements set out in the UCITS IV Directive regarding the exchange of information between Member State Regulators with respect to both UCITS and their management companies in circumstances where the UCITS and the UCITS management company are domiciled in different Member States. These include the following:-

- (i) a requirement for the UCITS Home Regulator to immediately inform the UCITS' management company's Home Regulator, of any decision to withdraw the authorisation for a UCITS, the suspension of the issue or redemption of the UCITS' units or in respect of any other serious measure taken against a UCITS;
- (ii) a requirement for the UCITS management company's Home Regulator to immediately notify the UCITS' Home Regulator where the management company's ability to properly perform its duties with respect to the UCITS is materially adversely affected or where the UCITS' management company does not fulfil the requirements set out in the UCITS IV Directive;
- (iii) a requirement for Member State Regulators to facilitate the exchange of information necessitated by the procedures for the authorisation of a management company to pursue activities within the territory of another Member State.

The grounds for a Regulator to decline a request for exchange of information or to act on a request for cooperation in carrying out an investigation or verification are limited to circumstances (i) where such a request might adversely affect the sovereignty, security or

public policy of the Requested Member State, (ii) where judicial proceedings have already been initiated in respect of the same persons/actions before the authorities of the Requested Member State, or (iii) where final judgment in respect of the same persons/actions has already been delivered in the Requested Member State.

Summary

The cross-border notification provisions under the UCITS IV Directive will revamp the current procedures and are expected to lead to greater efficiencies in the market of UCITS on a cross-border basis. The most radical impact of the cross-border notification provision is the reduction of delay and costs. In addition, it is anticipated that the co-operation mechanisms set out in the UCITS IV Directive will assist with making the interpretation and implementation of the UCITS rules simpler and more consistent throughout the European Union.

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