

The UCITS Marketing Passport

Introduction

A number of significant reforms to the UCITS regulatory regime were implemented in July 2011, designed to modernise and enhance the UCITS framework, increase efficiencies for industry participants and reduce operating costs. These reforms were introduced by what is known as the UCITS IV directive, which also consolidated into one piece of legislation all of the previous UCITS legislative measures (with the exception of the 2007 Eligible Assets Directive.)¹

Prior to the enactment of UCITS IV, the day to day operation of the registration process which underpinned the UCITS passport was inefficient in certain respects. The UCITS IV introduced a notification procedure designed to accelerate and provide a common European approach to the process of bringing UCITS to market across the EU.

Background

One of the primary objectives of the whole UCITS project is to harmonise retail collective investment schemes in the EU through the introduction of a common investment vehicle which can be established and regulated in one EU member state and sold across the EU without the need for further authorisation. As such, UCITS have an "EU passport" enabling their units or shares to be marketed and sold in the other EU member states and a UCITS authorised in one EU member state cannot be prohibited from selling or promoting the sale of its shares or units to the public in any other EU member state. Before the introduction of UCITS IV, the registration process which gave effect to the passport required the UCITS to notify the host member state that it would like to register its units / shares for public sale in that country. This had the result of making the passport regime inefficient and uncertain, as member states were given some latitude to apply their own rules and requirements to registrations and many of them used this latitude to make registration difficult, time consuming and costly, in part at least, to protect their domestic funds industries.

To address this, UCITS IV introduced a notification procedure designed to eradicate the national differences, accelerate the notification procedure and provide a common approach to the relevant documentation. The change has brought the UCITS passporting regime in line with other EU passports (eg, under the Banking Directive, the Markets in Financial Instruments Directive and the Prospectus Directive). Cornerstones of the procedure include a regulator to regulator electronic process; reduced notification timelines of 10 working days from submission to the home regulator (the Central Bank in the case of Ireland); a prohibition on member states from imposing any additional requirements or administrative procedures other than those set out in the UCITS Directive; and the requirement that the only fund document which now requires translation into one of the official languages of the host member state or into a language approved by the competent authorities of that member state is the key investor information document (the "KIID").

Notification Procedure

Notification in Ireland

Ireland has long been recognised as the domicile of choice for cross-border fund distribution and accounts for a significant amount of the European cross-border fund market. The Irish implementing regulations designate the Central Bank of Ireland (the "**Central Bank**") as the competent authority with responsibility for the authorisation and supervision of UCITS in Ireland.

Initial Notifications

Initial notifications will generally only apply to the registration of a new UCITS or new sub-fund of an existing umbrella fund. Broadly, the steps involved in the notification process are as follows:

1. The consolidated UCITS provisions as set out in Directive 2009/65/EC and later amended by Directive 2014/91/EU are referred to in this briefing note as the UCITS Directive

- A UCITS seeking to market its units in another member state will inform its home regulator of its intention by submitting a standard form notification letter (which includes information on arrangements made for marketing units of the UCITS in the host member state), together with the latest version of the UCITS' rules or instruments of incorporation (eg, its instrument of incorporation, memorandum and articles of association or trust deed), its prospectus, its KIID and its latest annual report and any subsequent half-yearly report attached (the "**Notification File**"). The Notification File must be provided electronically.
- The home regulator checks the Notification File and, if complete, transmits it to the host regulator no later than 10 working days after receipt with a standard form attestation confirming that the UCITS fulfils its obligations under the Directive. Please note, if the Central Bank upon reviewing the Notification File notes that additional documents are required (or if there is a problem with any of the documents submitted), the 10 day period will begin to run from the day the documents are resubmitted. Furthermore, the day the filing is made is not counted as one of the 10 working days within which the Central Bank must transmit the documents to the competent authority in the host member state.
- The attestation and the Notification File must be provided in a language customary in the sphere of international finance (eg, English) unless the member states agree that this documentation can be provided in an official language of both. As noted above, the only fund document which now requires translation into one of the official languages of the host member state or into a language approved by the competent authorities of that member state is the KIID.
- The UCITS must also provide the home member state with details of the website where the documents are available electronically (the Central Bank will not confirm onward transmission of documents to the host regulator until it has been able to access the documents on the specified website). It is generally permissible to include a confirmation in the notification letter that the translated documents and the key fund documents will be uploaded on the specific section of the website aimed at investors in the country in which the UCITS is seeking to be registered after the Central Bank confirms onward transmission of the documents to the host regulator. This is in order to avoid issues with documents being available on the internet to the general public in a member state prior to the notification of marketing in that member state being approved.
- The host regulator is not entitled to review, challenge or discuss the merits of the UCITS authorisation granted by the home regulator and the host regulator will not request any additional documents, certificates or information other than those specified by the UCITS Directive. Part B of the standard UCITS notification letter does however contain sections covering the marketing of the UCITS in the host member state. This is the primary area where the UCITS Directive may allow the host regulator to impose differing standards in terms of the information required. For example, many member states have specific media where information must be made available (such as in Germany where certain information regarding shares of a registered UCITS must be published in the electronic version of the Federal Gazette), and local counsel will need to be consulted in this regard.
- Upon transmission of the notification documentation, the home regulator must immediately notify the UCITS of this transmission. The UCITS may access the market of the host member state as of the date of this notification.
- The rules with respect to ensuring that facilities are available in the host member state for making payments to investors, repurchasing or redeeming units and making available the information which UCITS are required to provide have not been altered by the Directive, and local marketing rules also apply. Therefore, it will be necessary to check with local counsel as to whether the host member state requires the appointment of distribution or paying agents. The marketing rules in some member states will decree that a paying agent agreement and details of the paying agent in the prospectus/country supplement be filed with the home member state in advance of registration.

Amendment Notifications

The documents in the Notification File and any translations of them must be kept up to date. In contrast to the initial notification, amendment notifications are still required to be submitted directly to the host member state. With regard to ongoing obligations, the UCITS must notify the host state regulator of any amendments to key fund documents and indicate where these can be found electronically. In addition, the UCITS must give advance written notice to the host state regulator of any changes to be made to the unit classes which will be marketed in the host member state. This responsibility rests solely with the UCITS. Therefore the UCITS will need to liaise with local counsel in relation to these amendment notifications.

Enhanced Requirements for Passporting under the UCITS Directive

Certain member states which have implemented the notification process have insisted on additional limitations with respect to passporting.

For example, the approach adopted by the French regulator is that a UCITS is not permitted to commence marketing in France until the French regulator itself confirms receipt of the Notification File. This approach would appear to be contrary to the UCITS Directive which provides that a UCITS may access the market of the host member state as and from the date of the notification of the transmission of documentation by the home regulator.

Finally, certain jurisdictions have additional requirements with respect to the appointment of local paying agents or the provision of country specific supplements for UCITS being distributed in their respective jurisdictions. While the Central Bank does not require either the appointment of a local paying agent or a country supplement for UCITS being marketed in Ireland, this should be borne in mind when marketing into other European jurisdictions.

Conclusion

The notification procedure introduced by the UCITS Directive enhanced the operation of the UCITS passport. As noted above, some member states which have adopted the notification process continue to impose specific obligations on UCITS contrary to the spirit of the Directive. Despite these impediments, the enhanced efficiency of the UCITS passport and greatly increased speed of access to host member state markets was a welcome development.

As part of the project to build a European Capital Markets Union (“**CMU**”), the European Commission (“**Commission**”) issued a consultation on the cross border distribution of investment funds in June 2016, which closed in October 2016. The Commission’s consultation paper acknowledged the important role investment funds have to play in achieving the Commission’s aim of creating a deeper single market for capital. The consultation sought stakeholders’ feedback on the current barriers to cross border distribution and it is to be hoped that the outcome of the consultation will lead to further enhancements to the UCITS marketing passport.

Full details of the Asset Management and Investment Funds Group, together with further updates, articles and briefing notes written by members of the Asset Management and Investment Funds team, can be accessed at www.matheson.com.

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