Cross-border distribution of investment funds

This briefing is one in a series of ‘implementation appraisals’, produced by the European Parliamentary Research Service (EPRS), on the operation of existing EU legislation in practice. Each briefing focuses on a specific EU law that is likely to be amended or reviewed, as foreseen in the European Commission’s annual work programme. Implementation appraisals aim to provide a succinct overview of publicly available material on the implementation, application and effectiveness to date of specific EU law, drawing on input from EU institutions and bodies, as well as external organisations. They are provided by the Ex-Post Evaluation Unit of EPRS, to assist parliamentary committees in their consideration of new European Commission proposals, once tabled.

Summary
The Directive on Undertakings for Collective Investment in Transferable Securities (UCITS) provides for strong investor protection and creates a label for European retail investment funds. The Directive on Alternative Investment Fund Managers (AIFM) lays down rules for the authorisation, supervision and oversight of managers of non-UCITS funds, i.e. alternative investment funds (AIFs).

Facilitating cross-border investment remains an essential part of the European Commission’s action plan on building a capital markets union (CMU); the current legislative initiative is limited to facilitating further the cross-border distribution and supervision of UCITS and AIFs, mainly by reducing national regulatory barriers. This briefing presents the rationale for both the existing legislation and the new legislative proposal, as well as the positions of the institutional bodies and stakeholders.

1. Background, legislative framework and size of the industry

1.1 Types of EU investment funds

a) UCITS: Council Directive 85/611/EEC of 20 December 1985 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) (the UCITS I Directive), pursued the objectives of 1) approximating the conditions for competition between UCITS at Community level, 2) achieving a more effective and more uniform protection for unit-holders, and 3) facilitating a collective investment undertaking situated in one Member State to market its units in other Member States, by establishing common basic rules for the authorisation, supervision, structure, activities and transparency of UCITS. The directive was amended several times, in particular by the UCITS III Directives: 2001/107/EC (introducing simplified prospectuses) and 2001/108/EC (removing barriers to cross-border marketing and including derivative financial instruments within the scope); these and other amendments were repealed by the recast Directive 2009/65/EC\(^1\) of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS).


\(^1\) Also known as the UCITS IV Directive; the most recent consolidated text of 17 September 2014 includes the amendments introduced by Directive 2014/91/EU (UCITS V).

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Directive is complemented by six (two implementing and four delegated) acts. Furthermore, the European Securities and Markets Authority (ESMA, created by Regulation (EU) No 1095/2010) issued questions and answers (ESMA34-43-392 of 5 October 2017) on the application of the UCITS Directive.

Table 1 – Overview of milestone amendments to the UCITS Directive

<table>
<thead>
<tr>
<th>UCITS I</th>
<th>20 December 1985</th>
<th>Directive 85/611/EC</th>
</tr>
</thead>
<tbody>
<tr>
<td>UCITS IV</td>
<td>13 July 2009</td>
<td>Directive 2009/65/EC (recast)</td>
</tr>
</tbody>
</table>


b) AIFs: In the aftermath of the 2007-2008 financial crisis and in view of regaining financial stability, on 23 September 2008 the European Parliament adopted two resolutions with recommendations to the Commission, on hedge funds and private equity (based on the Rasmussen report, ECON committee) and on transparency of institutional investors (based on the Lehne report, JURI committee). The Commission took up the Parliament’s recommendations for legislative action and on 30 April 2009 it came forward with a proposal2 for a directive on alternative investment fund managers, which led to the adoption of Directive 2011/61/EU of 8 June 2011 on alternative investment fund managers (the AIFM Directive, or AIFMD). AIFs are not within the scope of the UCITS Directive. While UCITS can be sold to retail clients, AIFs can only be sold using the EU passport to institutional investors.3 AIFs include hedge funds, private equity funds, real estate funds and a wide range of other funds. All AIFs have to be registered, and those with more than €100 million in assets under management (AuM),4 need to be authorised (Article 3 AIFMD).5 The AIFMD is complemented by five implementing and delegated acts. Furthermore, ESMA has issued questions and answers on the application of the AIFMD (ESMA34-32-352 of 5 October 2017).

There are additional rules for the following subsets of AIFs (cf. Figure 1):
- Regulation (EU) No 345/20136 on European venture capital funds (EuVECA) lays down a framework of rules regarding the use of the designation ‘EuVECA’ for qualifying venture capital funds, intended in favour of start-ups and innovative companies. On 26 March 2018, the ESMA database featured 142 registered EuVECA funds.
- Regulation (EU) No 346/20137 on European social entrepreneurship funds (EuSEF) lays down a framework of rules on the designation ‘EuSEF’, with the aim of achieving a positive social impact and addressing social objectives, rather than only maximising profit. The regulation is part of the Commission’s Social Business Initiative. On 26 March 2018, ESMA featured seven registered EuSEF funds.
- Regulation (EU) 2015/760 on European long-term investment funds (ELTIFs) (the ELTIFs Regulation) targets specific types of projects that require long-term funding and focus on infrastructure, SMEs and ‘real assets’ (such as gold, oil or property, which have value due to their own substance and properties). The ELTIFs Regulation started to apply on 9 December 2015. ESMA does not yet have an ELTIFs register.

c) MMFs: Contrary to the three above-mentioned regulations on specific subcategories of AIFs, Regulation (EU) 2017/1131 on money market funds (MMFs) (the MMFs Regulation) covers a subset of both

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2 COM(2009) 207, accompanied by a press release of 29 April 2009; the proposal also got input from the high-level expert group on financial supervision in the EU, mandated by the Commission, see the ‘de Larosière report’ of 25 February 2009.
3 Under Article 43 of the AIFMD, Member States may allow AIFMs to market to retail.
4 Commission Delegated Regulation (EU) No 231/2013 of 19 December 2012 supplementing Directive 2011/61/EU with regard to exemptions, general operating conditions, depositaries, leverage, transparency and supervision, contains rules (Articles 3 to 5) for calculating the assets under management of AIFs.
5 AIFs using only unleveraged portfolios (i.e. not engaging debt) must be authorised if their size exceeds €500 million.
UCITS and AIF types. MMFs are investment vehicles offering households, corporate treasurers or insurance companies relatively safe short-term investment for surplus cash. They are an important source of short-term financing for financial institutions, corporate entities and governments. In order to preserve the integrity and stability of the internal market, the MMFs Regulation aims to make MMFs more resilient to a future financial crisis. According to Commission data from 2013, MMFs manage approximately 38% of short-term debt issued by the banking sector and around 22% of short-term securities issued by corporations and governments in the EU; in total, European MMFs manage assets of approximately €1 trillion\(^8\) and constitute around 15% of the EU’s funds industry.\(^9\)

The Commission impact assessment\(^10\) on the cross-border distribution of collective investment funds summarises the **intervention logic** of the UCITS and AIFM directives as follows:\(^11\)

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**UCITS**

**Need:**
Create a EU-level regulatory framework for retail investment funds

**Objectives:** *
Lay the basis for a single market for retail funds and the conditions subject to which investment funds could be sold to investors across borders

**Input:**
Directive 2009/65/EC in the areas of:
- marketing requirements
- regulatory fees
- administrative requirements
- notification requirements

**Output:**
Common requirements for the organisation, management and marketing of UCITS

**Results:**
Better functioning of the marketing passports to allow UCITS to be marketed more easily across the EU

**Impact:**
Increase i) the number and ii) the assets under management held by UCITS marketed cross-border

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**AIFMD**

**Need:**
Harmonise requirements for entities engaged in the management and administration of AIFs, i.e. non-UCITS funds

**Objectives:** *
Provide for an internal market for AIF managers (AIFMs) and the conditions subject to which AIFMs may market AIFs to professional investors in the EU

**Input:**
Directive 2011/61/EU in the areas of:
- marketing requirements
- regulatory fees
- notification requirements

**Output:**
Common requirements for the management and marketing of AIFs

**Results:**
Better functioning of the marketing passports to allow AIFs to be marketed more easily across the EU

**Impact:**
Increase i) the number and ii) the assets under management held by AIFs marketed cross-border

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* Other objectives are not part of this evaluation. 

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\(^8\) 1 trillion = \(10^{12}\) = 1 000 billion.


\(^11\) SWD(2018) 54, p. 77; the presentation of the intervention logic is limited to the cross-border distribution of investment funds.
On 30 September 2015, the Commission adopted an action plan on building a capital markets union (CMU) by 2019, ‘to boost business funding and investment financing’. In its communication12 of 8 June 2017 on the mid-term review of the CMU action plan, the Commission identified priority measures for completing the CMU. One of these measures focuses on simplifying cross-border investment and was included in the REFIT13 scoreboard14 accompanying the Commission’s 2018 work programme.15 The measure in question aims to increase the cross-border distribution of investment funds across the EU by reducing regulatory barriers, by further harmonising national requirements relating to marketing, notification, administrative arrangements and regulatory fees, and by providing greater transparency on the remaining national requirements.16 To achieve this aim, the measure proposed to amend the UCITS Directive, the AIFMD and the related regulations.

Figure 1 – EU legislative framework for investment funds, June 2017


Figure 2 – Breakdown of UCITS and AIFs by investment type (based on net assets)

Source: European Commission SWD(2018) 54, p. 10, based on the EFAMA quarterly statistical release, Q2, 2017

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13 REFIT – making EU law simpler and less costly.
14 REFIT scoreboard of 24 October 2017, p. 196.
16 REFIT scoreboard, p. 196.
1.2 Size and composition of EU investment funds

According to the impact assessment accompanying the Commission proposal on facilitating cross-border distribution of collective investment funds (COM(2018) 92 and COM(2018) 110), the European investment fund industry (AIFs and UCITS) represented €14 310 billion assets under management (AuM) in June 2017, of which 60.8 % was invested in UCITS and 39.2 % in AIFs.17

The Commission states18 that 'UCITS' has developed into a strong brand over the years and is nowadays recognised globally. By June 2017, UCITS AuM had grown to €8 704 billion in value. The market for AIFs is growing steadily, too: by the same date, AIF AuM amounted to €5 606 billion. Figure 2 above shows the different investment categories of UCITS and AIFs.

1.3 Total worth of collective investment funds by country and worldwide

The following table shows the combined net assets of UCITS and AIFs in 2016 by the country where the funds are domiciled19:

Table 2 – Combined net assets of nationally domiciled UCITS and AIFs, Europe, end 2016

<table>
<thead>
<tr>
<th>Country</th>
<th>EUR billion</th>
<th>Share %</th>
<th>EUR billion</th>
<th>Share %</th>
<th>EUR billion</th>
<th>Share %</th>
</tr>
</thead>
<tbody>
<tr>
<td>Europe</td>
<td>14 144</td>
<td>100</td>
<td>276</td>
<td>2.0</td>
<td>19</td>
<td>0.1</td>
</tr>
<tr>
<td>Luxembourg</td>
<td>3 701</td>
<td>26.2</td>
<td>269</td>
<td>1.9</td>
<td>10</td>
<td>0.1</td>
</tr>
<tr>
<td>Ireland</td>
<td>2 085</td>
<td>14.7</td>
<td>174</td>
<td>1.2</td>
<td>9</td>
<td>0.1</td>
</tr>
<tr>
<td>Germany</td>
<td>1 886</td>
<td>13.3</td>
<td>127</td>
<td>0.9</td>
<td>9</td>
<td>0.1</td>
</tr>
<tr>
<td>France</td>
<td>1 784</td>
<td>12.6</td>
<td>108</td>
<td>0.8</td>
<td>7</td>
<td>0.1</td>
</tr>
<tr>
<td>UK</td>
<td>1 466</td>
<td>10.4</td>
<td>106</td>
<td>0.8</td>
<td>6</td>
<td>0.04</td>
</tr>
<tr>
<td>Netherlands</td>
<td>802</td>
<td>5.7</td>
<td>59</td>
<td>0.4</td>
<td>3</td>
<td>0.02</td>
</tr>
<tr>
<td>Switzerland</td>
<td>538</td>
<td>3.8</td>
<td>44</td>
<td>0.3</td>
<td>3</td>
<td>0.02</td>
</tr>
<tr>
<td>Sweden</td>
<td>304</td>
<td>2.1</td>
<td>27</td>
<td>0.2</td>
<td>2</td>
<td>0.02</td>
</tr>
<tr>
<td>Italy</td>
<td>300</td>
<td>2.1</td>
<td>22</td>
<td>0.2</td>
<td>0.5</td>
<td>0.004</td>
</tr>
</tbody>
</table>

Source: based on the EFAMA Fact Book 2017, p. 36.

Investment funds worldwide: At the end of 2016, the net assets of the investment funds domiciled in the United States amounted to €20 trillion; in Europe, they amounted to €14 trillion, in Australia and Japan, to €1.5 trillion each, in Canada to €1.3 trillion and in China to €1.2 trillion.21

1.4 Investment funds marketed cross-border

The Commission impact assessment distinguishes 'true cross-border' funds from 'round-trip funds'.22 The latter concern funds that are domiciled and authorised in one Member State (different from the manager’s Member State) and are then distributed only in the Member State where the manager is based. The impact

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17 SWD(2018) 54, p. 9, based on data from the European Fund and Asset Management Association EFAMA. The data include figures from all EU Member States and Liechtenstein, Norway, Switzerland and Turkey.
18 Ibid., p. 9.
19 Investment funds are only a part of the investment industry. For example, in its annual survey of September 2017 (p. 14), the British Investment Association gives the following amounts for the total assets of the UK’s asset management industry at end-2016: GBP 6.9 trillion (=€7.9 trillion), equal to 373 % of UK GDP (the average EU ratio being about 100 %). On p. 16, the survey estimates the total assets managed in the UK at GBP 8.1 trillion if hedge funds, private equity and other types of assets managed by non-members of the British Investment Association are included.
20 EU plus the EEA countries Liechtenstein and Norway, and the non-EEA countries Switzerland and Turkey. No data were available there on Estonia, Latvia and Lithuania, nor on the EEA country Iceland (see EFAMA Fact Book 2017, p. 36).
21 Figures (rounded) based on the EFAMA Fact Book 2017, p. 53.
assessment includes 'round-trip funds' in the category of 'domestic funds'. 'True' cross-border funds, on the other hand, are marketed in two or more Member States other than that of the fund’s domicile.

Table 3 – Percentage of UCITS and AIFs registered for sale across the EU

<table>
<thead>
<tr>
<th>Country registered for sale</th>
<th>Number of UCITS registered for sale</th>
<th>Number of AIFs registered for sale</th>
</tr>
</thead>
<tbody>
<tr>
<td>Domestic only</td>
<td>11 650</td>
<td>9 455</td>
</tr>
<tr>
<td>Two countries</td>
<td>4 326</td>
<td>586</td>
</tr>
<tr>
<td>Three to five countries</td>
<td>3 440</td>
<td>246</td>
</tr>
<tr>
<td>More than five countries</td>
<td>5 897</td>
<td>112</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td><strong>25 313</strong></td>
<td><strong>10 399</strong></td>
</tr>
</tbody>
</table>

Source: European Commission figures based on the Morningstar database, June 2017.23

1.5 Barriers to the cross-border distribution of investment funds

In the public consultation on the cross-border distribution of investment funds, conducted by the Commission from 2 June to 9 October 2016, asset managers were asked about the main reasons for not distributing investment funds in the different Member States. In its impact assessment,24 the Commission presents the feedback as follows:

Figure 4 – Feedback from asset managers

What are the reasons for any limitation on the cross-border distribution of funds? (responses for each Member State and multiple answers possible)


The present Commission proposal focuses on regulatory cost, considering factors related to structural elements of local markets or to expected demand (including market structure, taxation, investors’ behaviour and online and direct distribution), to be ‘out of scope’.25 The impact assessment identifies further barriers in the form of diverging interpretations of the two directives across Member States (for instance, whether

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24 Ibid., pp. 19-20.
transactions in the remuneration of professionals of the management company or AIFM and transactions on their behalf can be considered to be 'marketing' depends on a Member State’s individual practice.26

1.6 Regulatory fees and administrative requirements in the Member States

According to the Commission impact assessment,27 the level of fees levied by host Member States on asset managers varies considerably, both in absolute amounts and in how they are calculated. For example, ongoing regulatory fees for a UCITS fund with five sub-funds marketed to retail investors vary from €0 to €10 275, and from €0 to €15 000 for an AIF with the same structure marketed to professional investors.

Compliance with the requirement to have local facilities in a Member State targeted for distribution may also be costly: The fees for such facilities can be around €5 500 per fund and per jurisdiction (at least seven Member States charge this amount or more), and can go up to €20 000 a year where funds are marketed to retail investors (in Italy).

2. EU-level reports, evaluations and studies

2.1 European Commission implementation reports and studies

**Mid-term review of the Capital markets union action plan – June 2017**

Based on its staff working documents SWD(2017) 224 (economic analysis) and SWD(2017) 225 (public consultation feedback), the Commission presented its mid-term review of the CMU action plan,28 in which it concluded that overall, the action plan had made good progress, with two thirds of the measures having already been implemented. It proposed, inter alia, an initiative for facilitating the cross-border distribution and supervision of UCITS and AIFs) for the following reasons:

- the need for greater clarity on existing substantive EU standards, which is particularly important for EU investors, national administrations and national court judges to ensure greater transparency on the effective protection of EU investor rights in the single market;
- bilateral investment treaties between Member States set varying standards of treatment that are outside the EU’s legal framework for cross-border investment within the single market. These treaties are considered incompatible with EU law.29

**Inception impact assessment on reducing barriers to cross-border distribution of investment funds – June 2017**

This roadmap builds on responses to several previous consultations,30 on a series of workshops with a number of trade bodies, and on input from the expert group on barriers to free movement of capital. The roadmap called on stakeholders to give their targeted feedback regarding the proposal on reducing barriers to cross-border distribution of investment funds between 22 June 2017 and 20 July 2017, in view of the impact assessment that was being prepared for it. The inception impact assessment foresees various options for each of the following topics/elements: marketing, administrative requirements, regulatory fees, notification requirements and online distribution.

**Impact assessment accompanying the Commission proposal on facilitating cross-border distribution of collective investment funds – March 2018**

Taking into account the above-mentioned consultations and additional institutional (European Central Bank, European Banking Authority, European Securities and Markets Authority) and industry input, the Commission

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26 Ibid., p. 103.
28 COM(2017) 292
29 Ibid., p. 16.
30 Green Paper on building the CMU, summary of responses of 30 September 2015; public consultation on cross-borders distribution of investment funds, closed on 9 October 2016; public consultation on the operations of the European Supervisory Authorities, feedback statement of 20 June 2017; the above-mentioned consultation in the framework of the mid-term review, see SWD(2017) 225.
made a two-fold proposal, composed of COM(2018) 92, for a directive amending Directive 2009/65/EC (UCITS) and Directive 2011/61/EU (AIFMD), and COM(2018) 110, for a regulation facilitating cross-border distribution of collective investment funds and amending Regulation (EU) No 345/2013 (EuVECA) and Regulation (EU) No 346/2013 (EuSEF, see above). The impact assessment31 contains an annex on 'Evaluation of relevant provisions in AIFM and UCITS Directives', focusing on the potential factors that may have prevented the wider distribution of investment funds as compared to initial expectations.32

2.2 European Parliament analyses, studies and references

Legislative Train – updated regularly
Being a part of the action plan for the capital markets union, which is among the Commission’s top priorities, the two proposals on cross-border distribution of collective investment funds are monitored in the Parliament’s Legislative Train Schedule.

Reviving risk capital: The proposal to amend the EuVECA and the EuSEF – September 2017

EU Mapping 2017: Systematic overview of the EU’s economic and financial legislation – July 2017
This graphic overview of core legislation in the area of economic and financial services places the UCITS and AIFM directives in the context of the numerous other pieces of legislation in this area.

ECON thesaurus on Brexit – July 2017
The thesaurus presents ECON-related articles, papers and studies on the possible withdrawal of the UK from the EU. A chapter is dedicated to the effects that Brexit would have on the financial services area, with sub-chapters on alternative investment funds and UCITS.

Implications of Brexit on EU financial services – June 2017
This study, prepared by the Policy Department for Economic and Scientific Policies at the request of the ECON committee, addresses the implications and economic impact of several scenarios of the UK leaving the EU in relation to financial services, with ample consideration of the AIFM and UCITS Directives.

Cross-border mergers and divisions, and transfers of seat: Is there a need to legislate? – June 2016
This study considers, inter alia, cross-border mergers of UCITS and finds that any substantial reform of Directive 2005/56/EC (the Cross-Border Mergers Directive) would necessarily raise the questions of an alignment of the corresponding provisions in the UCITS Directive.

UCITS: EU regulation and amounts invested - June 2011
This briefing describes the evolution from the first UCITS Directive of 1985 to the recast UCITS Directive of 2009, which came into force on 1 July 2011. It also presents key issues at stake (the management company passport; the need to speed up the authorisation procedures; cooperation between Member States; mergers, the key-investor-information document, and the tax problem) and shows cumulative amounts of investment funds in and outside EU.

Consumer protection aspects of the UCITS amending directives of July 1998 and November 1999
Produced by Parliament’s former Directorate-General for Research for the ECON committee, this 1999 working paper shows that consumer protection aspects were relevant even in the early stages of the UCITS legislation.

3. European Parliament positions / MEPs' questions

3.1 Resolutions of the European Parliament

European Parliament legislative resolution of 26 October 2017 on the proposal for a regulation laying down common rules on securitisation and creating a European framework for simple, transparent and standardised securitisation

The purpose of the Commission's proposal of 30 September 2015 was to restart a sustainable securitisation market that would improve the financing of the EU economy, while ensuring financial stability and investor protection. The report extended the scope of the proposal by extending the scope of the term 'institutional investor' (in the proposal, this term covered AIFMs, among other things) also to UCITS. This approach was maintained in the resulting Regulation (EU) 2017/2402.


The purpose of the Commission's proposal of 4 September 2013 was to ensure uniform prudential requirements that apply to money market funds throughout the Union. The resolution also introduced explicitly 'governance and transparency', with the purpose 'to ensure uniform prudential, governance and transparency requirements that apply to money market funds (MMFs) throughout the Union'.

European Parliament legislative resolution of 28 April 2016 on the proposal for a regulation on indices used as benchmarks in financial instruments and financial contracts

The purpose of the Commission's proposal of 18 September 2013 was to establish a regulatory framework at Union level for indices used as benchmarks in financial instruments and financial contracts whilst ensuring a high level of consumer and investor protection. In its resolution, the Parliament added the requirement to measure the performance of investment funds. It furthermore strengthened the requirements with regard to governance and conflict of interest as well as those with regard to oversight, methodology and transparency. The procedure resulted in Regulation (EU) 2016/1011.


The purpose of the Commission's proposal of 26 June 2013 was to stimulate long-term investment in the real economy through European long-term investment funds (ELTIFs). The ECON report amended the proposal, inter alia by introducing measures to ensure that ELTIFs do not promote speculative investments, and by strengthening the rules for the protection of retail investors and the transparency requirements. The procedure resulted in the ELTIF Regulation (see above).

European Parliament legislative resolution of 11 November 2010 on the proposal for a directive on alternative investment fund managers

With its proposal, the Commission was following up on two resolutions of the Parliament of 23 September 2008, on hedge funds and private equity and on transparency of institutional investors. The ECON committee report amended the proposal, in particular as regards the asset stripping and remuneration principles, and the rules on the passporting system, depositary liability, capital requirements, and use of leverage. Subsequently, on 26 October 2010, the Parliament reached an agreement with the Council on the final text, which is now known as the AIFM Directive.

3.2 Written questions by MEPs

There have been only very few33 questions, all of them related to hedge funds. No questions have addressed the cross-border distribution of UCITS and AIFs.

4. Council and European Council

In its conclusions of 23 June 2017, the European Council emphasised that further efforts are needed by the EU and its Member States to achieve the level of ambition as reflected in the June 2016 conclusions for the single market, including the capital markets union. In this context, it welcomed the Commission's mid-term review of the capital markets union action plan and underlined that timely implementation and better enforcement of existing legislation are key to reaping the benefits of Europe's single market. It announced that the Council will report to the June 2018 European Council on progress in deepening, implementing and enforcing the single market in all its aspects. In order to look beyond the finalisation of the different single market strategies and evolve towards a future-proof and fair single market, the European Council called on the Commission to pursue its reflections on innovative ways to address new opportunities, challenges and remaining barriers.\(^{34}\)

5. Court of Justice of the European Union

The Court has decided on a number of cases related to cross-border tax discrimination of UCITS, reacting to requests for a preliminary ruling.\(^{35}\)

**Judgment** of 26 May 2016, case C 48/15
The Court ruled that '[...]

2. Council Directive 85/611/EEC of 20 December 1985 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS), read, if appropriate, in conjunction with Article 10 EC and Article 293, second indent, EC, must be interpreted as not precluding the legislation of a Member State imposing an annual tax on UCIs, such as the tax at issue in the main proceedings, which makes UCIs governed by foreign law marketing units in that Member State subject to that tax, provided that that legislation is applied in a non-discriminatory way.

3. Article 56 EC must be interpreted as not precluding the legislation of a Member State imposing an annual tax on UCIs, such as the tax at issue in the main proceedings, which makes UCIs governed by foreign law marketing units in that Member State subject to that tax.

4. Article 49 EC must be interpreted as precluding a national provision, such as Article 162(2) of the Inheritance Tax Code, as amended by the Programme Law of 22 December 2003, by which a Member State imposes a specific penalty, namely the prohibition, ordered by a court, of making future investments of its units in that Member State, on UCIs governed by foreign law in the event of non-compliance by the latter with the obligation to file the annual declaration necessary for the recovery of a tax on UCIs or in the event of non-payment of that tax'.

**Judgment** of 10 April 2014, case C 190/12
The Court ruled that

1. Article 63 TFEU on the free movement of capital applies in a situation, where, under national tax legislation, the dividends paid by companies established in a Member State to investment funds established in a non-Member State are not the subject of a tax exemption, while investment funds established in that Member State receive such an exemption.

2. Articles 63 TFEU and 65 TFEU must be interpreted as precluding tax legislation of a Member State, under which dividends paid by companies established in that Member State to an investment fund situated in a non-Member State cannot qualify for a tax exemption, provided that that Member State and the non-Member State concerned are bound by an obligation under a convention on mutual administrative assistance which enables the national tax authorities to verify any information which may be transmitted by the investment fund'.

**Judgment** of 7 June 2012, case C 39/11

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\(^{34}\) European Council Conclusions: A **Rolling Check-List** of Commitments to Date, EPRS, European Parliament, December 2017, pp. 21-22.

\(^{35}\) Cross-border tax discrimination can have the effect of barriers to cross-border distribution of investment funds, see impact assessment SWD(2018) 54, pp. 127-135.
The Court ruled that Article 63(1) TFEU must be interpreted as precluding national legislation that does not permit a severance fund, or the undertaking for collective investment created by that severance fund to manage its assets, to invest those assets in units of an investment fund established in another Member State unless that investment fund has been authorised to market its units within the national territory.

Judgment of 10 May 2012, joined cases C 338/11 to C 347/11
The Court ruled that ‘Articles 63 and 65 TFEU must be interpreted as precluding the legislation of a Member State which provides for the taxation, by means of withholding tax, of nationally-sourced dividends when they are received by [UCITS] resident in another State, whereas such dividends are exempt from tax when received by [UCITS] resident in the Member State in question.’

6. European Central Bank
At the request of the European Parliament for an opinion on the proposal (COM(2012) 350) to amend the UCITS Directive 2009/65/EC as regards depositary functions, remuneration policies and sanctions ('UCITS V'), the ECB delivered an opinion on 11 January 2013. Its contents are summarised in the Legislative Observatory procedure document as follows:

'The ECB broadly welcomes the proposed directive. However, it makes the following observations:

- Reuse of assets by a UCITS depositary: the ECB considers that the proposed directive should explicitly prohibit a UCITS depositary or any party to whom the custody of a UCITS fund has been delegated from reusing the assets under its management for its own account.
- Delegation: the proposed directive allows a depositary’s safekeeping duties to be delegated to a sub-custodian under certain conditions. In this respect, the ECB considers that protection of retail investors requires more stringent rules for UCITS depositaries than for depositaries appointed by alternative investment funds managers. In particular, the delegation by a UCITS depositary to a sub-custodian located outside the European Union should be subject in all cases to appropriate safeguards, such as minimum capital requirements and effective supervision in the country concerned.
- Eligibility to act as a UCITS custodian: the ECB supports the introduction of eligibility conditions according to which only credit institutions and investment firms may act as UCITS depositaries. Moreover, it should be further assessed whether the proposed regime for capital requirements for credit institutions and investment firms provides for adequate safeguards in relation to the exercise of the UCITS depositary functions.
- Liability: the ECB considers that the 'external events beyond reasonable control' which trigger the possibility for a depositary to discharge liability by contract should be specified in the Commission delegated acts in a detailed manner'.

7. European Economic and Social Committee
At the request of the Council, on 29 April 2010 the EESC adopted its opinion on the proposal for a directive on alternative investment funds. In it, the EESC underlined that liquidity requires financial markets and systems that are as transparent as possible, and that it saw a vital need to put transparency and liquidity at the heart of the agenda. It also called for avoiding unnecessarily burdensome restrictions.

In its opinion (ECO/437) of 19 October 2017 on 'the Capital Markets Union: Mid-Term Review', it endorsed the nine new priority actions of the Commission, including facilitating the cross-border distribution and supervision of UCITS and AIFs.

8. European Commission public consultations
The proposal and its accompanying impact assessment on facilitating cross-border distribution of collective investment funds are based on several stakeholder consultations.36

- a public consultation on the green paper on the capital markets union, 18 February to 13 May 2015;37
- a public consultation in the framework of the call for evidence on the EU regulatory framework for financial services, for identifying benefits, unintended effects, consistency and coherence of the financial legislation, 30 September 2015 to 31 January 2016;38
- a public consultation on cross-border distribution of investment funds, 2 June to 9 October 2016;39
- feedback from stakeholders who responded to the consultations, through 28 targeted interviews;
- feedback from other stakeholders through 15 bilateral meetings with Commission staff;
- statistics and data from Morningstar, ESMA, EFAMA40 and the Investment Company Institute (ICI);41
- market reports and dedicated studies by consultancy firms (Price Waterhouse Coopers, Deloitte, etc.);
- in addition, the Commission took into account the exchange of views between Member States that took place in the context of the expert group on barriers to free movement of capital.42

A stakeholder consultation by KPMG on behalf of the Commission’s Directorate-General for Financial Stability, Financial Services and Capital Markets Union (DG FISMA), on how the AIFMD worked in practice and to what extent its objectives were met, closes in April 2018. DG FISMA outsourced a comprehensive ex-post evaluation of the functioning of the AIFMD, in view of Article 69 (Review) of the AIFMD.43

Table 4 – The UCITS and AIFM directives

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<th>Directive</th>
<th>Description</th>
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<tr>
<td>2009/65/EC</td>
<td>Directive of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS)</td>
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| EP committee responsible at time of adoption of the EU legislation: | Economic and Monetary Affairs (ECON) |
| Date of adoption of original legislation in plenary: | 13 January 2009 (UCITS IV, recast), 11 November 2010 (AIFMD) |
| Deadline for transposition of legislation: | 30 June 2011 (UCITS IV),44 22 July 2013 (AIFMD) |
| Planned dates for review of legislation: | UCITS IV: 1 July 2013;45 AIFMD: ’By 22 July 2017, the Commission shall...start a review on the application and the scope of this Directive. That review shall analyse...the degree to which the objectives of this Directive have been achieved. The Commission shall, if necessary, propose appropriate amendments.’ |
| Timeline for the new amending legislative proposal: | The proposals were published on 12 March 2018 |

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41 http://www.icifactbook.org/
42 http://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail.groupDetail&groupId=3388
43 The resulting evaluation should be accomplished by the second half of 2018, according to the tender documents.
44 13 March 2016 for UCITS V.
45 The Commission proposal, COM(2012) 350, led to UCITS V.