

Upcoming changes to the marketing regime of UCITS and AIF's in Denmark

On 18 November 2020, the Danish Financial Supervisory Authority (FSA) has initiated a public consultation regarding new Executive Order on foreign UCITS' marketing in Denmark and an Executive Order on authorisation for managers of alternative investment funds for marketing to retail investors for consultation. The main amendment relates to the removal of the requirement for a physical presence in Denmark through local representatives.



The purpose of the amendments to the Executive Orders is to implement certain articles of Directive (EU) 2019/1160 of the European Parliament and of the Council of 20 June 2019 amending Directives 2009/65/EC (“**MiFID**”) and 2011/61/EU (“**AIFMD**”) with regard to cross-border distribution of collective investment undertakings (hereinafter “**Cross-border Directive**”). The Cross-border Directive amends the UCITS Directive and the AIFM Directive respectively and aims to harmonise the rules on the marketing of UCITS and alternative investment funds.

Background

The common objectives of both MiFID and AIFMD include ensuring a level playing field among collective investment undertakings and removing restrictions on the free movement of units and shares of collective investment undertakings in the Union and at the same time ensuring more uniform protection for investors. While those objectives have been largely achieved, certain barriers still hinder the ability of fund managers to fully benefit from the internal market. The Cross-border Directive is complemented by Regulation (EU) 2019/1156 of the European Parliament and of the Council (the “**Cross-border Regulation**”), which is applied in its entirety across the EU.

It has been found necessary to fill in the regulatory gap, which is why the Cross-border Directive and Regulation aims collectively to further coordinate the conditions for fund managers operating in the internal market and facilitate cross-border distribution of the funds they manage.

The main amendments

Article 1(4) and 2(6) of the Cross-border Directive regulates which facilities that must be provided to retail investors in the Member States where a UCITS or an alternative investment fund is marketed across borders.

Among other things, the provisions must ensure that there are uniform rules for the treatment of retail investors and the facilities made available to investors, regardless of whether the investment is made in a UCITS or in an alternative investment fund.

As a consequence of the above, the most significant amendments made to the Danish Executive Orders are as follows:

- Complete alternation of the section regarding local physical presence, as the cross-border Directive introduces that Member States of the EU can no longer require a local physical presence in the host state. With the new wording, Article 1(4) of the Cross-border Directive is implemented in Danish law. As such, the revised sections set out specific requirements for the provision of marketing in Denmark without a requirement to establish a local presence, including the appointment of a local representative in Denmark.
- The penalty provision provides specification as to which person will be subject to a penalty for breaches of the statutory rules, in which case it will be a board member of a foreign UCITS or AIFM. In addition, the draft contains verbal alterations, including references to paragraphs and linguistic changes.

The drafts have also been sent for consultation to a number of organisations, and the Danish FSA has requested any comments on the two Executive Orders no later than 4 January 2021 at 12 noon.