

OPINION

Practical arrangements for the late transposition of the UCITS IV Directive

1. Legal basis

1. ESMA's competence to deliver an opinion is based on Article 29(1) (a) of Regulation (EC) No 1095/2010 (the 'Regulation'). In accordance with Article 44(1) of the Regulation the Board of Supervisors has adopted this opinion.

2. Background

2. The deadline for the transposition of the UCITS IV Directive (Directive 2009/65/EC, hereafter the Directive) into national legislation was 1 July 2011. However, most Member States (MS) have not yet fully transposed the Directive and its implementing measures. Late transposition can create difficult situations where some competent authorities may not have the legislative framework in place to allow a proper implementation of the Directive.
3. Without prejudice to any initiatives taken by the European Commission in case of late transposition by MS, ESMA intends to address the situation at an operational level in order to minimise, as far as possible, the impact on industry and investors deriving from lack of transposition.
4. ESMA proposes practical arrangements for cross-border operations involving one MS that has not transposed the Directive.

3. Identification of the problems caused by late transposition of the Directive

5. ESMA has identified the following issues which could be addressed via practical arrangements between competent authorities:
 - A UCITS management company in a MS where the Directive has been transposed may not be able to use the management company passport if the MS in which the management company wants to create a fund has not transposed the Directive.
 - Competent authorities of MS that have transposed the Directive may have difficulties notifying the marketing of UCITS established in their jurisdictions to other competent authorities if the host MS has not transposed the Directive.
 - A competent authority of a MS that has transposed the Directive may receive a notification for a UCITS from a competent authority of a MS that has not transposed the Directive.

- A UCITS management company of a MS where the Directive has not been transposed could not create a feeder fund with a master fund established in another EU jurisdiction.
 - Similarly, a UCITS management company of a MS where the Directive has not been transposed could not merge one of its UCITS (merging UCITS) with a UCITS established in another EU jurisdiction.
6. Not all situations arising from non-transposition can be accommodated by way of practical arrangements that are legally sound.
 7. The practical arrangements proposed are based on the jurisprudence of the Court of Justice of the European Union (CJEU) on direct applicability of self-executing provisions contained in the relevant EU directives.
 8. The Directive gives, unequivocally, to UCITS management companies and investment companies rights to be exercised, namely marketing of units of UCITS on a cross-border basis and the provision of services, including, in the case of UCITS management companies, management of collective portfolios on a cross-border basis.
 9. According to the general statement of primary law, 'A directive shall be binding as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods' (Article 288 of the Treaty on the Functioning of the European Union).
 10. In the process of transposition MS are obliged to create a legal framework in which the rights and obligations arising from the directive can be recognised with sufficient clarity and certainty to enable citizens to invoke them. In other words, MS have an obligation to reconcile their legal order with the objectives of a directive at the end of the transposition period.
 11. It must also be noted that the CJEU held that MS are liable to pay damages where loss is sustained by reason of failure to transpose a directive in whole or in part.
 12. ESMA analysed the relevant provisions of the Directive and adopted this opinion on the practical arrangements to be followed by EU competent authorities.

4. Possible arrangements before implementation of the Directive in all MS

4.1. UCITS notifications

4.1.1. New UCITS notifications when the host MS has not transposed the Directive

13. The host MS competent authority cannot refuse a valid notification under the Directive on the ground that the Directive has not yet been implemented in the host jurisdiction.

4.1.2. New UCITS notification when the home MS has not transposed the Directive

14. The home authority in a non-transposing country is not entitled to notify new UCITS unless national legislation, even if did not transpose entirely the UCITS IV package, provides for rules which already materially comply with Articles 12, 14, 15 and 51 of the Directive and, where applicable, with their related implementing measures. The home authority in the non-transposing country should also be in a position to fulfil its obligations on access to documents pursuant to Article 93(7) of the Directive, as

well as Article 31 of Directive 2010/44/EU. In such a case the relevant measures to ensure investor protection and proper operation of the fund are already in place.

15. Competent authorities in non-transposing countries need to provide to ESMA the national legislation related to Articles 12, 14, 15 and 51 of the Directive and, where applicable, with their implementing measures. On this condition, UCITS established in these MS could be notified in transposing MS via the regulator-to regulator procedure provided for in the Directive. To that end, ESMA will develop a template to be used by competent authorities of non-transposing MS.
16. If the current national legislation of non-transposing MS does not already materially comply with Articles 12, 14, 15 and 51 of the Directive and, where applicable, their implementing measures, notification via the regulator-to regulator procedure provided for in the Directive could still be possible under the condition that both the competent authority and the management company of the UCITS certify to the competent authority of the host MS that the UCITS management company complies on a voluntary basis with the articles of the Directive listed above and the host competent authority is satisfied by this statement. The home authority in the non-transposing country should also be in a position to fulfil its obligations on access to documents pursuant to Article 93(7) of the Directive, as well as Article 31 of Directive 2010/44/EU.

4.2. Management company passport

17. ESMA believes that UCITS management companies established in a transposing MS should be able to create a fund via the management company passport in a MS where the Directive has not been transposed irrespective of the provisions currently in place in such jurisdiction since the relevant provisions of the Directive are of a self-executing nature. Any local restrictions will need to be disapplied.
18. Management companies established in a non-transposing country can make use of the management company passport only if the current national legislation materially complies with Articles 12, 14, 15 and 51 of the Directive and, where applicable, their implementing measures and the relevant competent authorities are able to provide the co-operation as required by Article 101 of the Directive and the relevant implementing measures in case of remote management.

4.3. Mergers

19. The Directive introduced provisions on mergers that apply to both cross-border mergers and mergers between UCITS established in the same MS. Therefore, it is necessary to distinguish the practical arrangements according to these two scenarios.

4.3.1. Mergers between two UCITS established in the same MS that has not transposed the Directive and at least one of the two UCITS is marketed in other MS.

20. The Directive requires that both merging and receiving UCITS provide information to their investors, including investors domiciled in a different MS. Therefore, if the current national legislation materially complies with Articles 40, 41, 42, 43 and 45 of the Directive and, where applicable, their implementing measures, the merger can be authorised. If the existing national legislation does not materially comply with Articles 40, 41, 42, 43 and 45 of the Directive and, where applicable, their implementing measures, the merger should not be permitted. ESMA should be provided with the relevant details of the national provisions referred to above.

4.3.2. Mergers between two UCITS established in different MS with one MS that has not transposed the Directive

21. Due to the inherent complexity of the operation, ESMA is of the view that cross-border mergers involving a UCITS established in a MS that has not transposed the Directive are not possible on the sole basis of the direct applicability of the Directive.

4.4. Master feeder structure

22. ESMA is of the view that master feeder structures should not be permitted if one of the two MS in which the UCITS are established has not transposed the Directive since this matter cannot be addressed solely on the basis of the direct applicability of the Directive.
23. Master feeder structures should also not be permitted if both the proposed master UCITS and the proposed feeder UCITS are located in a MS which has not transposed the Directive and the proposed feeder UCITS has been notified in accordance with Article 93 of the Directive to another MS (please refer to Art. 64(2) of the Directive).