

Opinion of the European Economic and Social Committee on

Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the applicable law to the proprietary effects of transactions in securities

[COM(2018) 89 final]

Proposal for a Directive of the European Parliament and of the Council amending Directive 2009/65/EU and Directive 2011/61/EU on cross-border distribution of collective investment fund

[COM(2018) 92 final — 2018/0041 (COD)]

Proposal for a Regulation of the European Parliament and of the Council on the law applicable to the third-party effects of assignments of claims

[COM(2018) 96 final — 2018/0044 (COD)]

Proposal for a Regulation of the European Parliament and of the Council on facilitating cross-border distribution of collective investment funds and amending Regulations (EU) No 345/2013 and (EU) No 346/2013

[COM(2018) 110 final — 2018/0045 (COD)]

(2018/C 367/10)

Rapporteur: **Petr ZAHRADNÍK**

Consultation	Council of the European Union 12.4.2018 European Parliament, 16.4.2018
Legal basis	Articles 53(1), 114 and 304 of the Treaty on the Functioning of the European Union
Odpovědná specializovaná sekce	Economic and Monetary Union and Economic and Social Cohesion
Adopted in section	27.6.2018
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Outcome of vote (for/against/abstentions)	152/0/1

1. Conclusions and recommendations

1.1. The EESC supports systematic efforts to launch all the key elements of the Capital Markets Union by 2019 and anticipates that the prospective benefits will include expanding investment opportunities, streamlining the process of financial intermediation, diversifying investment and better risk management capabilities.

1.2. The EESC thinks it important, when it comes to opening up new opportunities for the cross-border distribution of investment funds, to establish a balanced relationship between investor protection requirements, which are key in this regard, while also giving the designers and distributors of investment products enough room for creativity.

1.3. Like the European Commission, the EESC thinks that the key regulatory barriers to cross-border distribution of investment funds at this time are marketing requirements, regulatory fees, notification procedures and administrative requirements at national level. At the same time, it is aware of the existence of other obstacles that the proposed measures do not cover, such as the harmonisation of tax rules, which is realistically more feasible in the long run.

1.4. However, the EESC also takes the view that the main reasons for the existing barriers to the cross-border distribution of investment funds lie primarily not with the current regulations and directives, but above all from the lack of detailed guidance and instructions from the European Securities and Markets Authority (ESMA), as a result of which each national jurisdiction has different rules. Most of the proposals should therefore be accompanied by detailed and explanatory ESMA instructions and the proposal for a new regulation should serve merely as the general framework ensuring a uniform approach to regulation.

1.5. The EESC believes that in order to achieve an economy-of-scale effect, manifestations of 'national inventiveness' in working out charging structures should be curbed and a path taken of having clearly defined and unambiguous national provisions that are consistent throughout the EU.

1.6. The EESC welcomes and supports the intention to improve transparency regarding regulatory fees, since this can help accelerate the cross-border distribution of investment funds. The role of ESMA is crucial here.

1.7. The EESC calls for the introduction of rules for the systematic notification of marketing communications that are rigorous enough in their effect to prevent the continuation of practices that may fragment the EU market.

1.8. The EESC welcomes the creation of the ESMA database, but notes that this should not involve the imposition of additional notification requirements on asset managers and that these requirements should apply exclusively to the competent national authorities.

1.9. Regarding the proposed rules for discontinuing promotion and marketing of investment funds, the EESC is inclined to take the view that the decision on termination should be optional and depend on the decision of the asset manager.

1.10. The EESC recommends more detailed rules be established to ensure the verification of qualifications and competence of persons providing investment services.

2. Background and broader context: introducing all elements of the Capital Markets Union by 2019

2.1. The Capital Markets Union is a long-term EU project to make financial intermediation more efficient and effective. Its impact should be seen after 2019 — when all of its currently envisaged building blocks are expected to be launched — with the creation of a favourable investment environment over the long term that will help towards strong economic growth, competitiveness and jobs.

2.2. In symbiosis with the Banking Union, a functioning Capital Markets Union will support the single market's operational environment and strengthen the Economic and Monetary Union. It will also help to make the EU more attractive worldwide for investment. A crucial element is strengthening the diversification aspect as a means of cross-border private risk-sharing. For this prerequisite to work, the spreading of poor-quality assets must be prevented. The risk would otherwise be further increased.

2.3. The European Commission's proposals continue the steps taken to create the Capital Markets Union since it was launched in 2015 with the aim of raising capital effectively and placing it — depending on its profitability — in such a way that it is available to all types of businesses, including SMEs.

2.4. The European Commission's current proposals specifically target support for the cross-border market in investment funds and focus on the covered bond market within the EU as a source of long-term financing and on providing greater legal certainty for cross-border transactions in securities and claims. These proposals must be seen in terms of their interconnectedness. At the same time, it is also essential to respect the FinTech action plan and the action plan on sustainable finance, since these too are very important for achieving a full-fledged Capital Markets Union.

2.5. The idea is to make greater progress on the Capital Markets Union by 2019 on at least three fronts: strengthening the role of European labels and passports for financial products, harmonising and simplifying rules to deepen and homogenise capital markets across borders and ensuring their more consistent and efficient supervision.

2.6. The intended purpose of the proposed measures is to achieve higher levels of integration and homogeneity in the investment funds market, reduce costs across borders, substantially increase the offer to investors and achieve better investor protection based on common rules. In this spirit, the opening up of markets for the cross-border distribution of investment funds is an opportunity, albeit one that necessitates the removal of national legislative and non-legislative barriers.

3. Purpose of facilitating cross-border distribution of collective investment funds

3.1. Collective investment funds are an important tool in the financial intermediation process that enable both private and public financial assets to be placed and invested in real business projects and productive public investment projects. The EU investment funds market amounts to a total of EUR 14,3 trillion, which is very close to the EU's GDP.

3.2. However, its potential has not yet been fully realised in the cross-border context, where around 37 % of undertakings for collective investment in transferable securities and about 3 % of alternative investment funds are registered for sale in more than three Member States.

3.3. The reasons for this state of affairs, in addition to remaining natural barriers, are regulatory restrictions impeding a wider cross-border distribution of investment funds. The intention of the Commission's proposals is to reduce the catalogue of these restrictions for all types of investment fund and to facilitate their cross-border distribution, which could speed this up and make the distributed products cheaper thanks to the economies of scale achieved. Regulatory restrictions are to be found primarily in the field of marketing requirements, regulatory fees, notification procedures and administrative requirements at national level. The way to remove these obstacles is by ensuring transparency and harmonisation. The proposed measures are mainly of a technical nature.

4. General comments

4.1. The EESC thinks the main reasons for the existing barriers to the cross-border distribution of investment funds lie primarily not with the relevant regulations and directives as currently framed, but rather with the lack of detailed guidance or instructions from ESMA and hence the different rules in various European jurisdictions. The new regulation should therefore be adopted for a minimum number of cases, while most of the proposals should focus on detailed and explanatory ESMA instructions that would ensure a clear explanation of the existing rules, rather than on adopting new standards, and thus build on ESMA's positive contribution so far to the alignment of the rules.

4.2. The EESC considers that the measures proposed in this opinion are certainly significant, although many of them are mainly supporting procedures of a technical nature. Overall, however, they also constitute a major contribution to the functioning of the EMU. At the same time, the EESC recommends incorporating the substance of all four documents in question into a new comprehensive proposal for a regulation.

4.3. The EESC believes that, when bringing in new rules of the game, the balanced relationship must be respected between investor protection requirements and giving enough room for creativity to the originators and vendors of investment products. The investor protection impact is bolstered by systematic financial education.

4.4. Highly accomplished EU legislation, such as the provisions on undertakings for collective investment in transferable securities (UCITS) and the Directive on Alternative Investment Fund Managers (AIFM), should take precedence over the general rules embodied in, for instance, the Markets in Financial Instruments Directive (MiFID). This is because actual experience shows that UCITS and AIFM provide a very sound framework for investment funds, whereas the EESC believes that MiFID involves — along with a number of benefits — a number of uncertainties, as a result of which it has, paradoxically, triggered further fragmentation of the single market and differences between countries within the EU.

4.5. The EESC respects the fact that the cross-border distribution of investment funds requires a stable tax system that creates the essentials for a sustainable business environment. Full harmonisation of tax rules, including tariffs, is not a consideration at this stage. Nevertheless, it must be envisaged that, in future, efforts toward tax harmonisation could help create uniform tax conditions in this segment throughout the whole of the EU. Current endeavours to align tax parameters, however, are focused on other tax instruments.

4.6. The EESC's view is that the way to achieve the desired economies of scale is to curb 'national inventiveness' in working out charging structures (in many cases going further than EU regulation in order to recoup essential costs) and having national provisions that are clearly defined, unambiguous and consistent.

4.7. *Commission communication on the applicable law to the proprietary effects of transactions in securities*

4.7.1. The EESC supports the aim of bringing in measures to reduce legal uncertainty for cross-border transactions in securities and claims. It considers it important to ensure clarity and predictability of the domestic law to be used for determining the owner of the assets underlying the transaction, since the legal risks stemming from uncertainties may create additional losses. It is therefore fundamental and necessary to explain the legal terminology for specifying the ownership and contractual elements.

4.8. *Regulation on the law applicable to the third-party effects of assignments of claims*

4.8.1. Further to the above-mentioned communication, the EESC welcomes the idea of eliminating the legal uncertainty described earlier by proposing uniform rules to determine which national law governs the ownership of a claim assigned on a cross-border basis. Cross-border assignment of a claim is a process by which firms can acquire liquidity and access to credit through specialised companies. The EESC acknowledges that legal certainty in this area will contribute to the strengthening of cross-border investments, including by engaging small and medium-sized enterprises (SMEs); this involves factoring, collateralisation and securitisation.

4.9. *Directive on cross-border distribution of collective investment funds*

4.9.1. The EESC supports the creation of an environment aimed at better exploiting the potential for cross-border distribution of investment funds by making national requirements for placing on the market more transparent at national and EU level, making the structure of regulatory fees more transparent at EU level and ensuring these fees are set in compliance with certain common principles.

4.9.2. The EESC prefers the choice of means to support local investors to be left to investment fund managers.

4.9.3. The EESC welcomes the harmonisation of procedures for using the 'passport' to distribute investment funds in a cross-border context.

4.9.4. The EESC supports the creation of harmonised rules for marketing communication.

4.9.5. The EESC supports the creation of a system in which Member States will ensure easy access of the legislation governing cross-border marketing of investment funds on their territory (by electronic means and in a language customary in the sphere of international finance).

4.10. *Regulation on facilitating cross-border distribution of collective investment funds*

4.10.1. The EESC welcomes the essential purpose of this regulation, which is to arrive at a shared understanding regarding the specification of requirements for marketing communications and measures aimed at ensuring the transparency of national provisions on the requirements for the marketing of funds.

4.10.2. The EESC supports the proposed practice whereby fees are proportionate to the supervisory tasks carried out. The EESC expects real benefits to come from maintaining an online database of fees and the relevant methods for calculating them and sees this as a genuine challenge. However, it recommends that these benefits be evaluated against the costs incurred and that possible risks associated with the functioning of the database be identified. The EESC plans to develop implementing technical standards for information about fees, as well as for ESMA to publish and maintain an online fee database.

4.10.3. The EESC appreciates the specification of the requirements for information flows and their standardisation and simplification, as well as the regulation of the pre-marketing process, in which investor appetite for forthcoming investment opportunities or strategies is tested.

5. Specific comments

5.1. Regarding the fees and charges levied by national competent authorities and their transparency, the EESC supports the proposal's intention to boost transparency on regulatory fees, including specifying ESMA's role in gathering the information needed. This measure has the potential, the EESC believes, to further facilitate the cross-border distribution of investment funds.

5.2. The suggestion is to introduce rules at the level of national competent authorities for the systematic notification of marketing communications in order to enable *ex-ante* checking of such material. However, the EESC thinks that having different rules for the national competent authorities could occasion a fragmentation of the EU market, given that there should be no differences within the single market. The EESC recommends that it should not be possible for the various competent national authorities to take different approaches in this matter.

5.3. While the EESC welcomes the creation of an ESMA database listing AIFMs, UCITS management companies, AIFs and UCITS, it would nevertheless add that it is not desirable to impose further notification requirements on asset managers. The EESC thinks it should be clear, therefore, that the notification requirements based on Articles 10 and 11 of the proposal for a regulation should be notification requirements for the competent national authorities and these should not place additional such requirements on market participants.

5.4. The EESC points out that that the proposed definition of pre-marketing should not be taken from the definition in the Directive on Alternative Investment Fund Managers; further legal purity and consistency are needed and experience in practice suggests non-legislative means and instruments could be a better — or the only — way to achieve this. The EESC fears that the present proposal could lead to further fragmentation of the single market by encouraging national interpretations.

5.5. Regarding the rules for discontinuing promotion and marketing of investment funds, the EESC takes the view that the proposed rules could lead to the distortion of the single market where investment funds are concerned. The decision to end the marketing of any investment fund units/shares in any jurisdiction should be exclusively a business decision of the company managing the assets. In terms of investor protection, this is adequately provided for (as practical experience attests) by:

- publication of decisions;
- providing information to investors;
- giving investors the chance to withdraw from the fund within a specified period of time.

5.6. *Other barriers to cross-border distribution of investment funds*

5.6.1. One of the other existing barriers to cross-border distribution are the rules on checking the qualifications of persons providing investment services. The EESC thinks more detailed rules should be adopted, for example:

- to which services the existing rules apply;
- to what type of activities in the provision of these services the rules apply;
- how the checking of qualifications should be performed when local (national) regulators are not able to introduce national procedures;
- recognition of various ways of checking qualifications at EU level using pan-European or worldwide procedures, such as CFA tests.

5.6.2. The EESC supports the establishment of detailed and unambiguous rules regarding what legislation covers the distribution of investment funds: it is not clear at present which rules (either MiFID or UCITS/Directive on Alternative Investment Fund Managers) apply to the distribution of funds. One of the main obstacles to cross-border distribution is, in the EESC's view, if each legislator takes a different approach. It should be clearly stated that the distribution of funds falls solely within the scope of UCITS/Directive on Alternative Investment Fund Managers (for own funds, managed funds and funds from third parties), where the management company needs neither a MiFID licence nor licences for services under MiFID.

5.6.3. The EESC is convinced that no local (national) notification should be required. Regulators should not have the opportunity to introduce reporting on local (national) funds either by means of regulatory reports in relation to the regulators, or by means of any obligation to publish data — in the press, for example.

5.6.4. The EESC thinks the ESMA interactive database on fees and charges should be extended in future to include:

- requirement of the time needed for any type of licence/registration;
- requirement of detailed information needed for local (national) reporting;
- requirement of local (national) distribution rules.

Brussels, 11 July 2018.

The President
of the European Economic and Social Committee
Luca JAHIER
