

UCITS IV - Cross-border notification of UCITS

From July 2011 the recast UCITS Directive (“UCITS IV”) introduces a new notification procedure for UCITS intending to market cross-border into other EU Member States.

Quick Reference Guide



Background

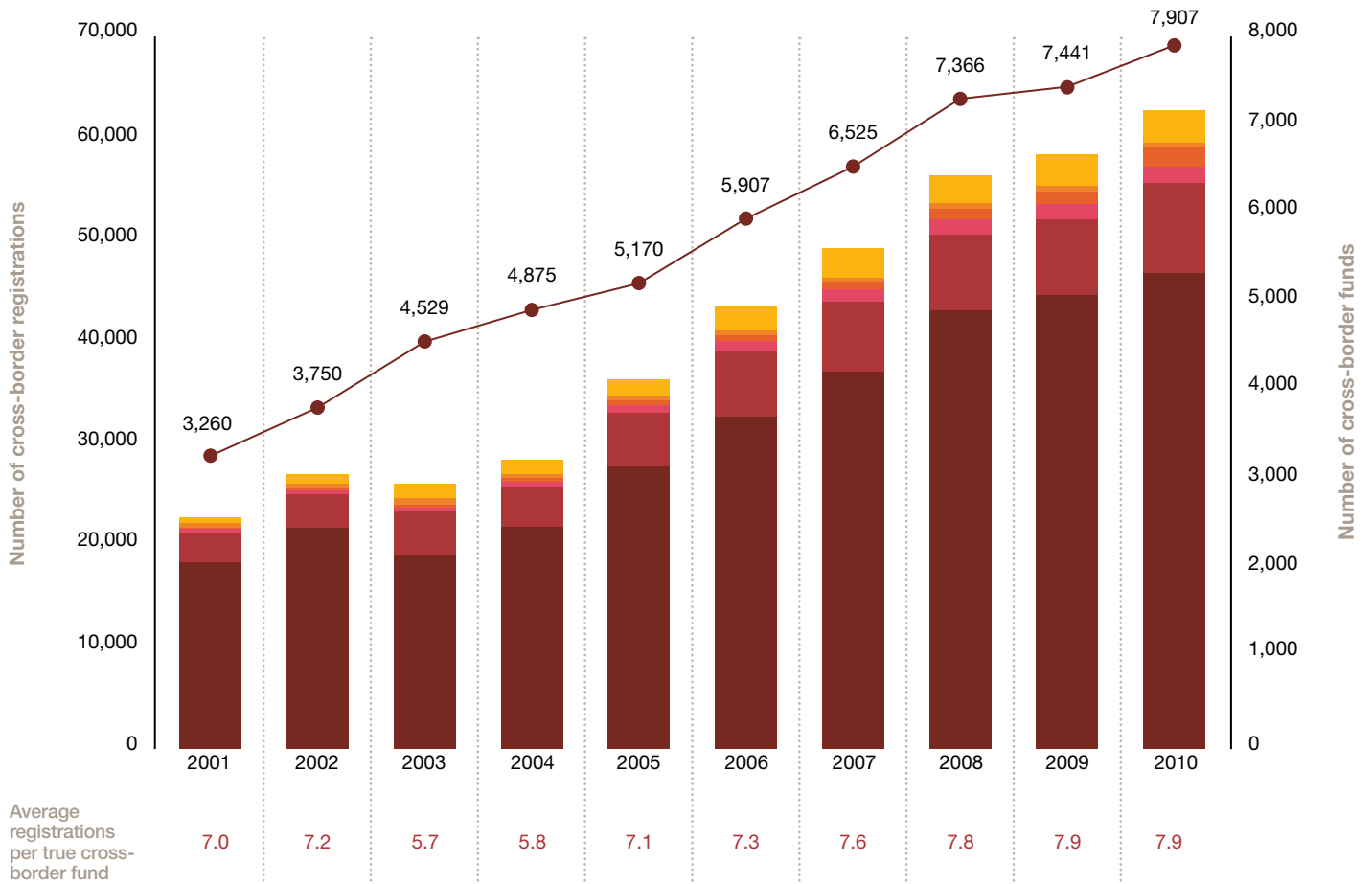
The last few years have seen a heavy focus on cross-border UCITS activities as an increasing number of asset managers have broadened their distribution strategies outside of their domestic environment. This trend has been assisted by the previous UCITS Directive (“UCITS III Directive”), together with the 2006 CESR notification guidelines, as demonstrated in the table below.

UCITS IV introduces standardised rules to follow by firms which intend to market their UCITS on a cross-border basis within the EU and will hence provide quicker market access than what is currently the case.

Underpinning the new notification procedure is the electronic transfer of standardised documentation between authorities in a short period of time before marketing can start.

The new procedure significantly shifts the ability of host EU country authorities to review documents or information pertaining to local marketing arrangements by the foreign UCITS after the beginning of marketing rather than before.

Number of cross-border funds and registrations



Average registrations per true cross-border fund

Source: Lipper Hindsight and PwC analysis, 31 December 2010

Note: Only true cross-border funds were taken into account - i.e. funds distributed in at least 3 countries including their domicile.

Funds Domicile:

- Luxembourg
- Ireland
- United Kingdom
- France
- Germany
- Other
- Number of cross-border funds

New notification procedures

The new notification (or registration as it is often referred to) procedure which permits cross-border marketing will involve a UCITS-to-home-regulator communication rather than UCITS-to-host-regulator. The home regulator will then transmit, within ten working days, a standardised notification file prepared by the UCITS, or its representative, to the host regulator. Normally, the host regulator has five working days to confirm the file is

complete. The home regulator transmission and confirmation thereof to the UCITS will trigger the right to start marketing in that host EU country without review by the host regulator. However, it is important to note that host regulators can review local marketing information after distribution has started.

Moreover, the new notification process is not as efficient or as harmonised as expected. The UCITS must continue to provide, where required, bespoke information concerning its local marketing arrangements in each EU Member State.

Indeed, once marketing begins, the process by which notification documentation must be kept up to date (including arrangements for local marketing) reverts to a UCITS-to-host-regulator, as is currently the case. So while speed to market will be improved, the overall level of simplification and reduction in administrative burden will be more modest.

Information and communication

Unfortunately, UCITS IV does not regulate the marketing activities of foreign UCITS in host Member States. As a compromise, host Member States must publish, presumably in English, details of their regulations and administrative provisions specifically related to the marketing arrangements of foreign UCITS in their jurisdiction. How much detail they will provide and the benefit this will be to market participants remains an open question.

Moreover, host Member States must be provided access to a website containing the documents required in the initial notification as well as any subsequent update of these documents. As under the current rule, it will remain the responsibility of the UCITS to keep this documentation up-to-date and provide the host regulators with details of any update by electronic means.

Translations

Under UCITS IV, only the Key Investor Information Document (“KIID”) is required to be translated into a language approved by the host Member State regulator. Other fund documents may be provided in English. However, commercial considerations will override this and we predict that many, maybe even the majority, of cross-border UCITS (especially those sold to retail investors in key markets) will continue to also translate the main prospectus and financial statements.

Contents of the notification letter

The form and to some extent, content of the notification letter to be submitted together with the UCITS attestation for cross-border notification has been standardised. Part A of the letter contains specific UCITS related information. Part B, which has been expanded, covers the various non-harmonised marketing requirements specific to each host Member State. At this stage we expect all of these local marketing rules to remain as UCITS IV starts.

Electronic transmission of notification files

Member State regulators must accept transmission and filing of notification documents by email. Upon sending of the notification email including the UCITS documentation, the home regulator must inform the UCITS of such transmissions. The host regulator is then required to confirm receipt/completeness of the notification file within five working days. The home regulator must ensure that the transmission of the complete documentation to the host regulator has taken place before it notifies the UCITS about its transmission.

Main operational and business implications

While the new notification procedure will improve speed to market, it does not go far enough and fails to fully harmonise the process within the EU. The notification process will remain overtly complex and cumbersome. There is no harmonisation of local marketing rules on cross-border UCITS, the new rules contain differing processes (involving different stakeholders), depending on what is trying to be achieved by the UCITS and, finally, host regulators will continue to review certain fund related information after marketing starts and subscriptions taken, meaning commercial risks remain.

Moreover, a myriad of other business implications and issues to consider and/or resolve remain, and some include:

- Can you rely on the information made publicly available by the Member States and what if the information provided is not fully up-to-date nor clear and precise?

- Your fund will remain responsible to ensure the notification file is complete before sending it to the home Member State regulator;
- A UCITS must ensure its marketing documents are in line with all host Member State local marketing requirements before finalising the notification file and sending it to the home regulator - how will you ensure this is the case?
- A UCITS must use the standard notification letter and ensure that Part B (non-harmonised requirements) are in line with host Member States requirements. Since information included in Part B will be different depending on each host Member State's requirements, there will be one specific file per country where the UCITS intends to be registered for distribution to the public;
- The new notification process will reduce time to market to ten days but should your marketing start before the five-day period in which host regulators confirm that the notification file is complete – is this extra delay an appropriate trade-off to obtain additional comfort?
- The new translation requirements will reduce the costs for UCITS, unless the commercial imperatives (including local distributors) continue to prefer translated versions to investors;
- UCITS will need to ensure they comply with local marketing laws, regulations and provisions applicable in host Member States to avoid ex-post sanctions by host regulators and regulation issues;
- What level of ex-post control will Member States actually impose and will local marketing rules be further expanded and made more complex?
- How will the marketing of UCITS in a host Member State be impacted in cases where the ex-post controls discover the UCITS is not in compliance with local requirements, especially in circumstances where subscriptions have been accepted?

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