



Exposure Draft

Initial orientations for discussion on possible adjustments to the UCITS Directive

5. Simplified prospectus – Investor disclosure regime

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1. Assessing the impacts of simplifying the Simplified Prospectus and the investor disclosure regime

1.1. Background

From the point of view of investor protection, it is essential that investors receive adequate information on the basic characteristics of financial products and the risks and costs associated with investing in such products so that they can decide what best suit their needs. Adequate disclosure is key to enable investors to take an investment decision on a properly informed basis and to compare among products. The UCITS Directive tried to achieve this goal through the introduction of the simplified prospectus (SP). The SP contains, in summary form, key information about the UCITS. It must be offered to investors free of charge before the conclusion of the contract.

However, the SP, as currently implemented, has proven not to be a useful tool to guide investors' investment decisions. In most cases, the document is too long and not understood by its intended readers. Member States have implemented the SP in different ways and some established additional stringent national requirements in spite of the 2004 Commission Recommendation on the SP¹. The outcome is a document of limited value to the investors and a considerable overhead for the fund industry.

The White Paper's Impact Assessment (IA) concluded that amending the UCITS Directive was the only effective option in order to correct the identified SP drawbacks. According to the IA, these changes should focus on clarifying the guiding principles of the SP and introducing targeted modifications to the content and format of the document. At the same time, the Directive could be amended to grant specific delegation powers to the Commission in conformity with the Lamfalussy approach to establish further details on the basis of the revised principles. This would introduce a mechanism for easier adaptations of detailed issues (e.g. content, format) in the future.

In line with the IA conclusions, the below options describe two different possible strategies to enhance the effectiveness of information disclosure.

1.2. Option description

Option 1: Maximum harmonisation at level 1

Amendments to the Directive would consist of small targeted repairs to the SP provisions (including fine-tuning Schedule C). These would aim at enhancing the usefulness for investors of the SP by improving the content and promoting a greater standardisation of the existing document. Lamfalussy powers could be introduced in order to allow further work at Level 2 to develop the format of the SP.

Pros

- Less risk of divergent implementation.
- More understandable document and easier to compare between funds.

¹ Commission Recommendation of 27 April 2004 on the contents of the simplified prospectus (2004/384/EC).

- Changes may require only limited adjustment costs for the industry.

Cons

- Rigidity of level 1. (More difficult to adapt later on the SP to evolving circumstances).
- New document may still be inadequate vis-à-vis certain type of investors or distribution methods.
- New document might not be able to take into account some specific product structures (fund with different sub-funds, fund offering different share classes, fund of funds, master-feeder funds)
- Uncertain that investors will find it more attractive/useful.
- New missed opportunity to test it with investors (before level 1 changes).

Option 2: New approach to investor disclosures

This new approach would set aside the current SP philosophy of using a single document containing a defined set of information. The SP would be referred to as "key investor information" - not necessarily to be included in a specific document. Changes to the Directive would concentrate on the main principles investor disclosures should follow (including the objective of the information, the nature of the information, the main elements to be disclosed, who should deliver it and to whom, methods of delivery). Schedule C will not be needed anymore. Details on the content and the format would be left to be developed at Level 2 (through the relevant Lamfalussy delegation provisions).

Pros

- Better match between the investor's information needs and the disclosures given to him/her.
- More flexibility (changes in the future allowed by new Lamfalussy delegation powers granted to the Commission).
- Possibility to better tailor disclosures to the type of investor, product structure and distribution channel.
- Clearer for the fund manager which are its (information) obligations/responsibilities.

Cons

- Probably greater adjustment costs for the industry.
- Delayed solution (changes at Level 1 will need to be complemented by work at Level 2)
- Risk that disclosures for different UCITS may still not be fully comparable.

1.3. Impacts analysis²

Option 1: Maximum harmonisation at level 1

A. Compliance costs

The changes that will need to be undertaken will inevitably have an economic impact on the industry. Adapting SP will probably imply additional design, printing (and even distribution)

² This section should be seen as a preliminary analysis of the potential implications of the different options. A more detailed impact assessment will be carried out at a later stage.

costs. However, the size of these adjustment costs will very much depend on the extent of the changes to be introduced and are therefore difficult to quantify at this stage. Introducing godfathering or transitional provisions³ could help to spread and reduce adjustment costs.

B. Investor protection impacts

The first question to be asked would be whether a more harmonised SP based on the current format would be effective, i.e. whether it would respond to the information an investor needs ahead of taking its investment decision. The answer is not straight forward; changes to Level 1 provisions can improve the usefulness of the document.

However, streamlining the contents of the SP may not be sufficient. Distribution methods are evolving; other investment/insurance products offering exposure to UCITS are sold; and the new SP may not be adapted to this changed context; it may not always reach the end-investors (e.g. when sales are done through the intermediary of an independent distributor, such as a fund supermarket, or when UCITS are wrapped up into another product). Besides, changing the SP content without any prior consumer testing regarding their appropriateness would lead to flawed or sub-optimal results. In the medium-term, the lack of flexibility of the new document (only format related details would be developed at Level 2) may require further amendments to the Directive to update the SP in line with changes in fund distribution methods and product design. Thus, investors may continue to be badly served by product disclosures that do not really meet their information needs.

Option 2: New approach to investor disclosures

A. Compliance costs

Since this option implies more radical changes to the information currently provided to the investor, one-off adjustment costs may be higher than in the case of option 1. However, the new approach would add flexibility. Fund promoters would be able to adapt more easily the information to the investor (retail or professional, resident in the country of the fund or in a host country) and to the distribution method used. This could lead to a more efficient management of the resources employed until now and lower on-going costs when viewed over the medium to longer term.

Again, godfathering or transitional provisions could be considered in order to manage adjustment costs.

B. Investor protection impacts

Option 2 introduces improvements in two steps. Some uncertainty may persist until Level 2 work is completed. Therefore, it may take longer to bring the new improved disclosures to the market.

On the other hand, this two-stage approach will allow testing of the new disclosures with investors and proper definition of their contents and format. Besides, launching some ground-

³ e.g. requiring that, up to a certain date, new SP provisions be applicable only to new funds or to those which need to update their SP.

work ahead of the adoption of the Level 1 changes may allow remodelled disclosures to be given effect quickly after adoption of the new Directive provisions⁴. In this way it can minimise any time-lag in bringing the benefits of the new approach into effect. The greater flexibility allowed by this option will facilitate adaptation of the SP to future changes in investor information needs.

1.4. Preferred option

The preferred option is therefore to introduce a new approach to investor disclosures (option 2). Its effectiveness should be higher. It has far more chances to meet the real information needs of investors. Also, clarifying the information delivery obligations and responsibilities can help the industry to make better use of the relevant resources. Finally, the flexibility introduced by the new delegation powers will allow adapting investor disclosures to the evolving market or investors' related circumstances. Option 1 (fine-tuning the current SP) may lead to a waste of efforts without significant improvements in the protection of investors.

1.5. Impact table

Impacts on → Option ↓	Compliance costs	Investor protection	Preferred option
Max. harmonisation at level 1	-	+	—
New approach for investor disclosures	- / +	++	X

1.6. Rationale behind other key choices regarding the proposed framework

Exemption for professional investors: UCITS are designed as retail products. However, there are also many institutional or professional investors which invest in UCITS. Proposed changes acknowledge that these investors do not have the same information needs as retail ones. In particular, the degree of detail and (basic) information pursued by the SP aims to inform (and therefore protect) the "man on the street". Professional investors have greater financial knowledge and capabilities to take investment decisions on their own. The possibility to exempt UCITS from the obligation to provide 'key investment information' to professional investors will allow fund promoters to adapt disclosures to the (professional) investor and to save unnecessary costs.

Delivery method depends on the type of distribution: The Directive obliges UCITS to provide certain disclosure documents to investors. However, this does not take into account current practices in the distribution of funds. The fund promoter/management company rarely has a direct contact with the investor. Intermediaries are most often the link between both.

⁴ The Commission is requesting CESR for assistance to carry out, in close consultation with all relevant stakeholders, groundwork on the detailed content and format of UCITS disclosures.

However, this implies that the fund promoter does not always have the possibility to ensure compliance with its information delivery obligations and that often the intermediaries (e.g. fund supermarkets) do not know how to obtain relevant information on the funds they offer. Proposed changes try to clarify who has the obligation to deliver the 'key investment information' and to whom, making a distinction between direct sales by the UCITS and intermediated sales. They should ensure that the information reaches more easily its intended addressee, the end-investor.

Possibility of electronic delivery: Related adjustments in the below section simply aim to adapt the Directive to modern times. The possibility to use electronic means would not only reduce the costs of providing information to investors (therefore improving the efficiency of the fund market) but also ensuring that the information reaches more easily its intended addressee (and, thus, enhancing investor protection). The necessary safeguards to protect investors would in any event need to be built in.

2. Shape of possible adjustments to the UCITS Directive

Possible adjustments to the UCITS Directive could be reviewing the existing disclosure provisions set out in Section VI of the Directive to provide a clear distinction between (i) information to be provided at any time, on request, to investors; and (ii) information which is to be provided to investors prior to subscribing units in a UCITS.

The concept of "simplified prospectus" would be replaced by a new concept of "key investor information" to be drawn up by the investment company, or in case of unit trust or common funds, the management company and to be provided to investors (either directly by the fund manager or through the relevant intermediaries) prior to the subscription of units in a UCITS by investors. For clarity, the provisions relating to "key investor information" would be bundled in a new sub-section C of Section VI. The existing Schedule C of Annex I would be deleted.

Sub-section A of Section VI would then deal with the information to be provided to investors/unit-holders free of charge on request, in particular the prospectus and the annual and half-yearly reports.

Sub-section B of Section V, dealing with "other information" would be maintained.

Another possible adjustment to the existing disclosure rules of the UCITS Directive would be to expressly provide for the (ex-post) disclosure of certain specified items (such as transaction costs) in the periodic reports. This would possibly require an amendment of Schedule B of Annex 1 of the Directive.

It is recognized that the proposed initial orientations of possible adjustments to the UCITS Directive might also have an impact on certain other Directives (e.g. MiFID) and that certain amendments to such other Directives might be required. This would however be dealt with at a next stage, after having received first reactions on our initial orientations.

In a similar way, transitional provisions/grandfathering provisions would be further considered at a next stage.

Some possible orientations on how the revised disclosure regime could look like in more detail are set out below. For clarity, where possible adjustments to the existing provisions are being considered, the text to be deleted, as well as the text to be added, has been clearly indicated.

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Section VI

Obligations concerning information to be *supplied provided to unit-holders investors*

A. Publication of a prospectus and periodical reports

Article 27

1. An investment company and, for each of the unit trusts and common funds it manages, a management company, must publish:
 - ~~a simplified prospectus~~
 - a full prospectus
 - an annual report for each financial year, and
 - a half-yearly report covering the first six months of the financial year.
2. The annual and half-yearly reports must be published within the following time limits, with effect from the ends of the periods to which they relate:
 - four months in the case of the annual report,
 - two months in the case of the half-yearly report.

Article 28

1. ~~Both the simplified and the full~~ **The** prospectus must include the information necessary for investors to be able to make an informed judgement of the investment proposed to them, and, in particular, of the risks attached thereto. The latter shall include, independent of the instruments invested in, a clear and easily understandable explanation of the fund's risk profile.
2. The full prospectus shall contain at least the information provided for in Schedule A, Annex I to this Directive, in so far as that information does not already appear in the fund rules or instruments of incorporation annexed to the full prospectus in accordance with Article 29(1).
3. ~~The simplified prospectus shall contain in summary form the key information provided for in Schedule C, Annex I to this Directive. It shall be structured and written in such a way that it can be easily understood by the average investor. Member States may permit that the simplified prospectus be attached to the full prospectus as a removable part of it. The simplified prospectus can be used as a marketing tool designed to be used in all Member States without alterations except translation. Member States may therefore not require any further documents or additional information to be added.~~
4. ~~Both the full and the simplified prospectus may be incorporated in a written document or in any durable medium having an equivalent legal status approved by the competent authorities.~~

~~5.~~ 3. The annual report must include a balance sheet or a statement of assets and liabilities, a detailed income and expenditure account for the financial year, a report on the activities of the financial year and the other information provided for in Schedule B, Annex I to this Directive, as well as any significant information which will enable investors to make an informed judgment on the development of the activities of the UCITS and its results.

~~6.~~ 4. The half-yearly report must include at least the information provided for in Chapters I to IV of Schedule B, Annex I to this Directive; where a UCITS has paid or proposes to pay an interim dividend, the figures must indicate the results after tax for the half-year concerned and the interim dividend paid or proposed.

Article 29

1. The fund rules or an investment company's instruments of incorporation shall form an integral part of the ~~full~~ prospectus and must be annexed thereto.

2. The documents referred to in paragraph 1 need not, however, be annexed to the ~~full~~ prospectus provided that the ~~unit holder~~ *investor* is informed that on request he or she will be sent those documents or be apprised of the place where, in each Member State in which the units are placed on the market, he or she may consult them.

Article 30

The essential elements of the ~~full~~ prospectuses must be kept up to date.

Article 31

The accounting information given in the annual report must be audited by one or more persons empowered by law to audit accounts in accordance with Council Directive 84/253/EEC of 10 April 1984 based on Article 54(3)(g) of the EEC Treaty on the approval of persons responsible for carrying out the statutory audits of accounting documents.

Article 32

UCITS must send their ~~simplified and full~~ prospectus and any amendments thereto, as well as their annual and half-yearly reports, to the competent authorities.

Article 33

~~1. The simplified prospectus must be offered to subscribers free of charge before the conclusion of the contract.~~

~~In addition, the full prospectus and the latest published annual and half yearly~~

~~reports shall be supplied to subscribers free of charge on request.~~

The *prospectus and the latest published* annual and half-yearly reports shall be ~~supplied~~ *provided to investors* ~~unit-holders~~ *free* of charge on request.

~~2. The annual and half-yearly reports shall be supplied to unit-holders free of charge on request.~~

The prospectus may be provided in a durable medium or in electronic form.

~~3.3.~~ The annual and half-yearly reports must be available to ~~the public~~ *investors* at the places, or through other means approved by the competent authorities, specified in the ~~full and simplified prospectus~~ *and the key investor information*.

4. In order to ensure the necessary protection of investors and the uniform application of paragraph 2, the Commission may adopt, in accordance with the procedure referred to in Article 53a, implementing measures which define the specific conditions which need to be met when providing the prospectus:

- (i) in a durable medium other than paper;*
- (ii) in electronic form.*

Explanatory comment

Throughout the disclosure section, references to "full prospectus" would be replaced by "prospectus" to ensure conformity with other provisions of the Directive. It would also no longer be necessary to use the term "full prospectus" if the concept of "simplified prospectus" is no longer used since there would no longer be a risk of confusion between two types of "prospectuses".

In addition, references to "unit-holders" would – for reasons of consistency – be replaced by "investors". Such change would however not intend to change the meaning of the relevant provisions.

Specification of the delivery method of the prospectus would be dealt with in Article 33 rather than in Article 28. Article 33 would indeed bundle the relevant provisions on publication/delivery methods of the prospectus, annual report and half-yearly reports, while Article 28 would focus on the content of such documents.

Article 33 would no longer make a reference to "subscriber". The term "subscriber" was used to refer to a potential purchaser to whom an investment proposal is made. It was used to distinguish from advertising aimed at the public generally to which the requirement set forth in old paragraph 1 did not apply. In the current text of the Directive, paragraph 1 of Article 33 dealt with the situation prior to subscription, i.e. the documents to be offered and/or supplied to potential purchasers prior to the entry into the contract while paragraph 2 dealt with the situation of information to be supplied to unit-holders after the investment has been made. It seems relevant to bring both situations together into one paragraph which would contain the principle that the prospectus and the latest published versions of the annual and half-yearly reports should be provided to "investors" free of charge upon request. The use of the word "investors" is considered to be more neutral than "subscribers": it covers both

potential purchasers and unit-holders once they have invested in units of a UCITS. The obligation to deliver the prospectus and/or the periodic reports would apply at any time: they should be delivered, upon request and free of charge, to the potential purchaser prior to the entry into the contract / subscribing to units in a UCITS and to the unit-holder once he/she has subscribed.

Article 33 would also align delivery methods of the prospectus with the envisaged delivery methods of key investor information. It would in particular introduce the possibility to publish the prospectus in electronic form. Implementing powers would be granted to the Commission to specify the specific conditions which need to be met for publishing the prospectus in a durable medium other than on paper, or in electronic form. When a prospectus is published in electronic form (e.g. on the website of a fund manager or financial intermediaries), additional safety measures compared to traditional means of publication, using best practices available, may indeed be necessary in order to maintain the integrity of the information and to avoid manipulation or modification from unauthorised persons, to avoid altering its comprehensibility and to escape from possible adverse consequences from different approaches when selling UCITS in other Member States. Such implementing measures would take account of the existing EU legislation on delivery of documents/information in electronic form (e.g. as laid down in MiFID⁵, the Prospectus Directive⁶ and other possibly relevant EU legislation).

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B. Publication of other information

Article 34

A UCITS may make public in an appropriate manner the issue, sale, re-purchase or redemption price of its units each time it issues, sells, re-purchases or redeems them, and at least twice a month. The competent authorities may, however, permit a UCITS to reduce the frequency to once a month on condition that such a derogation does not prejudice the interest of ~~unit holders~~ *investors*.

Article 35

All publicity comprising an invitation to purchase the units of UCITS must indicate that ~~prospectuses~~ *a prospectus exists and that key investor information is available. It must specify* and the places where ~~they~~ *such information or documents* may be obtained by the public or how the public may have access ~~to them~~ *to such information or documents*.

⁵ Directive 2004/109/EC of the European Parliament and of the Council and its implementing legislation (mainly Commission Directive 2006/73/EC).

⁶ Directive 2003/71/EC of the European Parliament and of the Council.

Explanatory comment

Publicity should inform investors of the information that is designed to help them to take an investment decision. Such information is laid down in the prospectus, but even more important, in the key investor information. Investors need to know where such information can be obtained. The reference to "prospectuses" (which included the full prospectus and the simplified prospectus), would therefore be replaced by a reference to "a prospectus and key investor information".

*

[New]

C. Key investor information

[Principle and content]

1. Member States shall require that an investment company and, for each of the unit trusts and common funds it manages, a management company shall draw up key investor information in respect of each of the UCITS it manages.

2. Key investor information shall include appropriate product information about the essential characteristics of the UCITS to be provided to investors so that they are reasonably able to understand the nature and the risks of the investment product that is being offered to them and, consequently, to take investment decisions on an informed basis. Such information shall be used without alternations, except translation, in all Member States where the UCITS is notified to market its units in accordance with Article 46. [It shall, in particular, include information on the following key elements:

- a) short description of the investment objectives and investment policy;
- b) costs and associated charges; and
- c) risk/reward profile of the investment, including appropriate guidance on and warnings of the risks associated with investments in the relevant UCITS.]⁷

3. Key investor information shall furthermore include appropriate practical information about the UCITS to be provided to [retail] investors so that they are reasonably able to understand how to exercise their rights associated with the investment product that is being offered to them. Such information shall, where relevant, be adapted to the local market of the investors to which UCITS are sold. [It shall, in particular, include information on:

- a) how to buy and sell units;
- b) when and how dividends on units or shares of the UCITS (if applicable) are distributed;
- c) frequency and where/how prices are published or made available;
- d) tax treatment; and

⁷ To be considered whether this should be moved to Level 2.

e) where/how to obtain additional information on the proposed investment, including but not limited to where and how the prospectus and the annual and half-yearly report can be obtained free of charge at any time.]⁸

4. Key investor information shall be drawn up in a comprehensible form and shall be presented in a way that is likely to be understood by retail investors⁹.

5. In order to ensure the necessary protection of investors and the uniform application of paragraphs 1 to 4, the Commission shall adopt, in accordance with the procedures referred to in Article 53a, implementing measures which define:

- a) the specific content of product information to be provided to investors under paragraph 2;
- b) the specific content of the practical information to be provided to investors under paragraph 3;
- c) the specific content of the key investor information to be provided to investors under paragraphs 2 and 3 in the following specific cases:

- (i) for UCITS having different investment compartments : key investor information to be provided to investors subscribing to a specific investment compartment, including how to pass from one investment compartment into another and the costs related thereto;

- (ii) for UCITS offering different share classes: key investor information to be provided to investors subscribing to a specific share class;

- (iii) for fund of funds structures: key investor information to be provided to investors subscribing to a UCITS who invests itself in other UCITS or other collective investment undertakings referred to in Article 19(1)(e);

- (iv) for master-feeder structures: key investor information to be provided to investors subscribing to a feeder UCITS, which shall include relevant information on the feeder UCITS, the master UCITS and the impact of the investment made in the master UCITS by the feeder UCITS;

- d) the specific details of the form and presentation of key investor information to be provided to investors under paragraph 4.

Such implementing measures shall take into account the retail or professional nature of investors.

⁸ To be considered whether this should be moved to Level 2.

⁹ Definition of "retail investor" might need to be inserted in the definitions section (taking into account the MiFID concepts of "retail clients", "professional clients" and "eligible counterparties")

Explanatory comment

As indicated above, one of the possible orientations would be to introduce a completely new approach to disclosure of investor information. This would include abolishing the concept of "Simplified Prospectus" and introducing an obligation for fund managers to draw up and provide "key investor information" to investors, not necessarily to be included in a specific document. The main purpose would be to achieve a greater harmonisation of the content and, if considered relevant, the format, design and presentation of the relevant information. Divergent implementation of the simplified prospectus disclosure rules was indeed considered to be one of the main reasons for its failure. Harmonisation of the key investor information made available to investors should provide equivalent investor protection at Community level.

The possible adjustments to the Directive would therefore be principles based. Further details on content and format would be decided through implementing measures at Level 2. It would therefore be envisaged to fully delete Schedule C (contents of the SP).

The envisaged approach would also seek to adapt product disclosures to take account of the different means through which UCITS are sold to end investors – direct sales (which accounts for only a small fraction of sales), intermediated sales, wrapping or structuring of products in other wrappers. It would require fund managers to make available information concerning the UCITS they manage. In case of direct sales, the fund manager would have to provide the key investor information directly to the investor. In case of intermediated sales, the fund manager would have to provide the key investor information to the relevant intermediaries. It seems however difficult to impose obligations through the UCITS Directive on non-UCITS entities to make effective use of this information. Regulation on how this information is used at the point of sale is to be left to the relevant intermediary legislation. MiFID provides a good starting point for investment firms. However, it may be necessary to go further and also look at fund sales through non-MiFID firms. These problems are particularly pronounced when UCITS are sold through tax or insurance wrappers.

There would be a clear obligation for fund managers to draw up and maintain useful information ("key investor information"). Key investor information would include both product information and practical information.

The rationale for delivering product information to investors would be clarified: i.e. enabling the investor to take an informed decision. The key items thereof should be specified. They could include investment policy/objectives, costs and associated charges, risk-reward profile of the investment. Product information should be further harmonised. It should not vary according to the domicile of the investor, i.e. if the essential characteristics of the UCITS remain the same irrespective of whether the UCITS is sold in the Home Member State or in another Member State. The proposed text would therefore delegate powers to the Commission to take implementing measures on the detailed content of product information.

The rationale for delivering practical information to investors would be clarified: i.e. enabling the investor to adequately exercise its rights. This information could differ according to the domicile of the investor. Further details on the detailed content thereof should be determined at Level 2.

The general principle that the information should be drawn up in a comprehensible form and presented in a way that is likely to be understood by retail investors would be inserted. Key

investor information is indeed mainly directed to retail investors: it should assist the average retail investor in taking an informed investment decision. Particular attention should therefore be given to the use of comprehensible wording and understandable format by such category of investors. Further details on how this should best look like are to be determined at Level 2.

Finally, the envisaged approach would include to provide for the adoption of detailed implementing legislation (at level 2) to flesh out the guiding principles and to apply them, in particular, to certain specific cases (UCITS with different sub-funds, UCITS offering different share classes, funds of funds and master-feeder structures).

It would also provide that the implementing measures should take into account the retail or professional nature of the investor. Key investor information, in particular product information, is provided with the main purpose to inform investors on the nature of and the risks associated with investing in UCITS so that they can take an investment decision on a properly informed basis. The level of detail of this information may be different for retail investors and professional investors. Possible exceptions of the general obligation to provide key investor information could be envisaged for professional investors. The detailed conditions thereof would have to be laid down at level 2. The envisaged approach is consistent with the approach followed under the relevant information provisions of MiFID, which take into account the status of a client as either retail or professional.

*

[Consistency with other disclosure documents - Liability]

1. Key investor information shall be fair, clear and not misleading. It shall be consistent with the relevant parts of the prospectus.
2. Member States shall ensure that no civil liability shall attach to any person solely on the basis of the key investor information, including any translation thereof, unless it is misleading, inaccurate or inconsistent with the relevant parts of the prospectus.

Explanatory comment

It would be expressly provided, as a general principle, that key investor information should be fair, clear and not misleading. It should also be consistent with the relevant parts of the prospectus.

It seems therefore relevant to (try to) clarify the legal status of key investor information. Key investor information should constitute pre-contractual information only: it must be provided to investors prior to the subscription of units in a UCITS to assist such investors in making the right investment decision. It should not be a contractual document. No civil liability should therefore be attached to any person solely on the basis of the key investor information unless such information is misleading, inaccurate or inconsistent with the relevant parts of the prospectus. This approach would be – to a certain extent - comparable with the approach taken in the Prospectus Directive 2003/71/EC.

*

[Delivery obligation]

1. Where the investment company and, for each of the unit trusts and common funds it manages, the management company, sells UCITS directly, or through a tied agent¹⁰, to investors, it shall provide such investors, either directly or through its tied agent, with key investor information on the UCITS in good time before the proposed subscription by the investor of units in UCITS.

2. Where the investment company and, for each of the unit trusts and common funds it manages, the management company, does not sell UCITS directly, or through a tied agent, to investors, it shall provide key investor information on UCITS its manages to product manufacturers and intermediaries selling or advising investors on potential investments in such UCITS or in products offering exposure to such UCITS, so as to enable them to provide such information to their clients or potential clients, in compliance with any information obligations applicable to them under the relevant Community and national law.

3. In order to ensure the necessary protection of investors and the uniform application of paragraph 2 and 3, the Commission may adopt, in accordance with the procedures referred to in Article 53a, implementing measures which define:

- a) how the investment company and, for each of the unit trusts and common funds it manages, the management company may adapt the content and form of key investor information to be provided to investors taking account of the different distribution channels referred to under paragraphs 2 and 3.
- b) how the investment company and, for each of the unit trusts and common funds it manages, the management company may adapt the content and form of key investor information to be provided to investors when investment/insurance products offering exposure to UCITS are sold to investors;
- c) the further criteria to determine which are the relevant entities to whom the investment company and, for each of the unit trusts and common funds it manages, the management company shall provide such key investor information.

Such implementing measures shall take into account the retail or professional nature of investors.

¹⁰ Definition of "tied agent" might need to be inserted in Article 1a (based upon the definition contained in Commission Directive 2006/73/EC)

Explanatory comment

When considering adequate disclosure to investors, and in particular to retail investors, it is important to clarify where the disclosure obligations of the fund manager (for the product) lie, taking into account the fact that UCITS are sold through different sales channels and the fund manager does not necessarily have a direct contact with the end-investor. The main question to be answered here is therefore: "who is to deliver the information to whom"?

The envisaged approach would make a distinction between direct sales (which would also include sales through a tied agent) and sales through the intermediary of other entities.

For direct sales, the obligation to provide key investment information to the investors would lie with the fund manager, or if applicable, its tied agent.

For indirect sales, the fund manager would be obliged to make the relevant disclosures available in appropriate form to other relevant parties/intermediaries who may execute orders (i.e. sell) or issue recommendations on UCITS (i.e. advice on UCITS). The envisaged approach would be to also require fund managers to make key investor information available to product manufacturers who integrate or package UCITS they manage into another product/wrapper (e.g. tax wrapper, insurance contract). It is however recognised that this is not an easy issue as a fund manager may not always be aware of the fact that UCITS are packaged into other products and/or that certain investment/insurance products offer exposure to UCITS it manages. This issue, and the practical impact thereof, might therefore need further consideration.

The envisaged disclosure regime would not impose obligations on investment firms or other intermediaries (non-UCITS entities) to make effective use of this information. Regulation on how this information is used at the point of sale should be left to relevant intermediary regulation (e.g. MiFID¹¹, Insurance Intermediation Directive¹²).

The Commission would be granted the necessary implementing powers to adapt, where considered useful, the content and form of key investor information to be provided to take account of the different sales channels used and the structuring of the products sold to investors. It could also further define the exact scope of the obligation to provide key investor information to product manufacturers and intermediaries selling or advising on "packaged" products offering exposure to UCITS.

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[Delivery methods]

1. The investment company and, for each of the unit trusts and common funds it manages, the management company may provide key investor information in a durable medium or in electronic form.

¹¹ Commission Directive 2006/73/EC, Articles 27 to 34.

¹² Insurance Mediation Directive 2002/92/EC

2. In order to ensure the necessary protection of investors and the uniform application of paragraph 1, the Commission may adopt, in accordance with the procedures referred to in Article 53a, implementing measures which define the specific conditions which need to be met when providing key investor information:

- (i) in a durable medium other than on paper;
- (ii) in electronic form.

Such measures shall take account the retail or professional nature of the investors to whom the key investor information is to be provided.

Explanatory comment

The different ways in which key investor information can be provided to investors would be clarified. It is envisaged that delivery of such information should be made possible either in a durable medium (e.g. paper copy) or in electronic form. The delivery methods of key investor information (which should be provided in good time prior to investing in a UCITS) and prospectus (which should only be delivered on request) would be aligned.

Delegation powers would therefore be granted to the Commission to further define the specific conditions which need to be met when providing key investor information in a durable medium other than paper or in electronic form. When key investor information is provided in electronic form (e.g. by means of electronic communications, posting on a website), additional safety measures compared to traditional means of publication, using best practices available, may indeed be necessary in order to maintain the integrity of the information and to avoid manipulation or modification from unauthorised persons, to avoid altering its comprehensibility and to escape from possible adverse consequences from different approaches when selling UCITS in other Member States. Such implementing measures shall take account of the existing EU legislation on delivery of documents/information in electronic form (e.g. as laid down in MiFID, the Prospectus Directive and other possibly relevant EU legislation).

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[Information of competent authorities – updating of information]

1. UCITS must send their key investor information and any amendments thereto, to the competent authorities of their Home Member State.

2. The key investor information must be kept up to date.

Explanatory comment

Key investor information (and any amendments thereto) would have to be sent to the competent authorities of the Home Member State. If a UCITS markets its units in a Member State other than that in which it is situated, it has to follow the notification procedure (regulator-to-regulator basis) set forth in Article 46. The envisaged approach is that Article 46

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would provide that the information package to be sent by the Home Member State regulator to the Host Member State regulator should also include the up-to-date version of the key investor information, as filed by the fund manager. A similar procedure would apply to any up-dates/amendments made to such information (i.e. fund manager to send such changes to the Home Member State regulator who is to transmit them to the Host Member State regulator). The main purpose here is to ensure as much as possible that fund managers have only one communication channel with regulators (i.e. with their home regulator).

3. Questions

Legal questions (*section 2*)

1. Does the proposed approach represent the most effective basis for achieving the stated objective (a sound approach to generating meaningful product disclosures that are relevant to the end-investor)? Can it help to resolve the problems that have beset the Simplified Prospectus (information overload, irrelevant information, gold-plating)? How could the proposed approach be improved and what alternative approaches could/should be envisaged?
2. Should these disclosures be produced in a physical document to support the sales process?
3. Should intermediaries and distributors be required to make effective use of these disclosures when selling UCITS or UCITS-based investments? What types of obligation could be imposed through point of sale regulation?
4. Do you consider that, when providing key investor information, a distinction should be made depending on the retail or professional nature of the investor?
5. What are the possible implications for investors of the envisaged regime to limit civil liability attached to the provision of key investor information to such situations where the information is misleading, inaccurate or inconsistent with the relevant parts of the prospectus?
6. In case of electronic delivery of key investor information, should the use of hyper-links to refer to additional information (prospectus, annual and half-yearly reports) be allowed and if so, what safeguards should be provided for?

Economic questions (*section 1*)

7. Do you agree with the analysis of the expected impacts? Are there any other economic or investor protection implications that should be taken into account?
8. Which possibilities could be considered in order to reduce the industry's adjustment and other compliance costs linked to the proposed provisions?
9. What is the estimated size of savings that could be expected if electronic means are used to provide fund's disclosures (e.g. in percentage of actual information delivery costs)? What would be the estimated size of savings that could be expected if UCITS are exempted to provide the same information to professional investors than to retail investors?
10. What is the estimated size of additional costs that could be expected if UCITS marketing its units in another Member State will need to comply with the relevant rules of the host Member State on language / publication methods to deliver key investor information to investors in such Member States?