



Brussels, 4.12.2017
C(2017) 7967 final

COMMISSION DELEGATED REGULATION (EU) .../...

of 4.12.2017

supplementing Regulation (EU) 2015/760 of the European Parliament and of the Council with regard to regulatory technical standards on financial derivative instruments solely serving hedging purposes, sufficient length of the life of the European long-term investment funds, assessment criteria for the market for potential buyers and valuation of the assets to be divested, and the types and characteristics of the facilities available to retail investors

(Text with EEA relevance)

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE DELEGATED ACT

1.1. General background and objectives

Regulation (EU) No 2015/760 on European long-term investment funds¹ (ELTIF Regulation) establishes a uniform set of rules for, in particular, the authorisation, eligible investment assets, diversification and concentration, redemptions, distribution of proceeds and capital, transparency, requirements for retail investors and marketing passport for European long-term investment funds (ELTIFs).

ELTIFs may only be EU alternative investment funds and may only be managed by EU alternative investment fund managers authorised in accordance with Directive 2011/61/EU on alternative investment fund managers (AIFMD).² An ELTIF must invest at least 70% of its capital in eligible investment assets such as long-term infrastructure projects, roll-out of new technologies and SMEs and assets referred to in Article 50(1) of Directive 2009/65/EC³ (UCITS Directive). An ELTIF may not offer redemption rights before the end of its life.

The ELTIF Regulation is applicable from 9 December 2015.

1.2. Legal background

The European Security Markets Authority (ESMA) has been required to develop draft regulatory technical standards (RTS) specifying the criteria for establishing the circumstances in which the use of financial derivative instruments solely serves hedging purposes under Article 9(3) of the ELTIF Regulation, the circumstances in which the life of an ELTIF is considered sufficient in length to cover the life-cycle of each of the individual assets of the ELTIF under Article 18(7) of the ELTIF Regulation, the criteria for an assessment of the market for potential buyers and a valuation of the assets to be divested under Article 21(3) of the ELTIF Regulation, common definitions, calculation methodologies and presentation formats of the costs and overall ratio of the costs to the capital of the ELTIF under Article 25(3) of the ELTIF Regulation and the types and characteristics of the facilities available to retail investors under Article 26(2) of the ELTIF Regulation.

The delivery of draft RTS on cost disclosures has been postponed to ensure their consistency with the legal requirements for key information documents for packaged retail and insurance-based investment products under Regulation (EU) No 1286/2014.⁴

2. CONSULTATIONS PRIOR TO THE ADOPTION OF THE ACT

ESMA has sought stakeholders' input and conducted an open public consultation on the draft RTS. Stakeholders were also involved in the development of the RTS through the advice of

¹ Regulation (EU) 2015/760 of the European Parliament and of the Council of 29 April 2015 on European long-term investment funds (OJ L 123, 19.5.2015, p. 98–121).

² Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010 (OJ L 174, 1.7.2011, p. 1–73).

³ Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) (OJ L 302, 17.11.2009, p. 32).

⁴ Regulation (EU) No 1286/2014 of the European Parliament and of the Council of 26 November 2014 on key information documents for packaged retail and insurance-based investment products (PRIIPs) (OJ L 352, 9.12.2014, p. 1–23).

the Security and Markets Stakeholder Group established in accordance with Article 37 of Regulation (EU) No 1095/2010.⁵

ESMA also carried out a mapping exercise among national competent authorities to identify the provisions that already exist at national level on the facilities available to retail investors under the UCITS Directive.

The ESMA final report includes a cost-benefit analysis.

3. LEGAL ELEMENTS OF THE DELEGATED ACT

ESMA submitted to the Commission the final report and draft RTS on 9 June 2016 combining RTS developed under Article 9(3), Article 18(7), Article 21(3) and Article 26(2) of the ELTIF Regulation. Given the strong interconnectedness of the contents of the four draft RTS, the Commission has endorsed such a bundling. In terms of process it helped ensure that the requirements introduced by the four RTS were fully consistent. A single legal act will be beneficial to all involved as it will make it easy to locate ELTIF level two provisions. This also helps ensuring that all requirements introduced by the four RTS are fully consistent.

Article 1 specifies in which circumstances the use of financial derivative instruments qualifies as solely serving the purpose of hedging the risks inherent to the investments. Hedging only occurs when financial derivative instruments are used to achieve a tangible reduction of the risks arising from the exposure of the ELTIF to the assets it invests in. Hedging could also occur with derivative instruments on underlying assets which are related to the same asset class as the ELTIF is invested into. The reduction of such risk through the use of financial derivative instruments must be measurable and objectively verifiable at the ELTIF level and the financial derivative instruments must be efficient in stressed market conditions. It is responsibility of the ELTIF manager to put in place the necessary arrangements to ensure that these requirements are met. Derivatives used to provide a return to the ELTIF are not considered as serving the purpose of hedging.

Article 2 specifies when the ELTIF life-cycle is considered sufficient in length so that each asset can be disposed within. The first condition is based on the maturity profile of the ELTIF assets at the time of the submission of the application for authorisation of the ELTIF to the competent authority. An ELTIF is sufficient in length when its end date corresponds to the end date of the investment horizon of the individual asset with the longest time horizon within its portfolio at the time of the submission of said application, taking into account its liquidity profile. Any investment made by the ELTIF after its authorization may not have a residual investment horizon that exceeds the remaining life of the ELTIF at the time when the investment is made.

Article 3 specifies the elements and risks related to each ELTIF underlying assets which an ELTIF manager must take into account in the assessment of the market for potential buyers. The fund manager must consider the expected timeframe necessary to find buyers for a single asset taking into account the liquidity profile of each assets, the financial profile of the buyers, the risks associated with legislative or political changes that might negatively affect the market and the risks linked to the deterioration of the market conditions of the assets.

Article 4 establishes the criteria to be considered with regard to the valuation of the assets to be divested in order to include an appropriate value in the schedule for the orderly disposal of

⁵ Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC (OJ L 331, 15.12.2010, p. 84–119).

the ELTIF assets. In particular, the valuation of the assets must not date more than six months from the date when the schedule is disclosed to the competent authority of the ELTIF. However, a valuation of the assets carried out under Article 19 AIFMD no more than six months before the disposal of the assets may qualify as a valuation that has taken place for the ELTIF purposes. In that respect, the preparation of the itemised schedule must take into consideration the deadline for the disclosure to the competent authority of the ELTIF.

Article 5 specifies the characteristics and functions of the facilities to be put in place by the manager of an ELTIF marketed to retail investors. The facilities must be designed to help retail investors to make subscriptions, payments, repurchases and redemption orders and help them to get access to information on the modalities how to make them. Facilities should also be in place to simplify the subscription and redemption proceeds, the exercise of retail investor's rights and the acquisition of relevant documents such as the fund rules or instruments of incorporation, the key information document, the prospectus and the annual reports. These facilities must be provided in the official languages of the Member State where the ELTIF is marketed in person, through telephone or electronic infrastructure. The facilities can be provided by either the ELTIF manager or by third entities, as long as they are equipped with all necessary documents to perform their tasks and that the contract is made in writing and clearly specifies the tasks not performed by the ELTIF manager.

Article 6 includes a grandfathering clause for already authorised ELTIFs as regards the requirements concerning the sufficient length of the life of the ELTIF. For all other requirements under this Commission Delegated Regulation, the compliance must be ensured within one year time after its entry into force.

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(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation (EU) 2015/760 of the European Parliament and of the Council on European long-term investment funds⁶, and in particular Article 9(3), Article 18(7), Article 21(3) and Article 26(2) thereof,

Whereas:

- (1) In order to ensure a common approach to the application of Regulation (EU) 2015/760, it is necessary to lay down provisions to specify the criteria for establishing the circumstances in which the use of financial derivative instruments solely serves hedging purposes, the circumstances in which the life of a European long-term investment fund ('ELTIF') is considered sufficient in length, the criteria to be used for certain elements of the itemised schedule for the orderly disposal of the ELTIF assets and the facilities available to retail investors.
- (2) To ensure coherence among those provisions which should enter into force at the same time, and, to facilitate a comprehensive view and easy access to those provisions, it is appropriate to adopt the regulatory technical standards concerned in a single Regulation.
- (3) With respect to the circumstances in which the use of financial derivative instruments solely serves the purpose of hedging the risks inherent to the investments of an ELTIF, it is necessary to take into account financial derivative instruments whose underlying corresponds to the assets in which the ELTIF has invested and whose exposures are intended to be hedged, as well as trades in assets that, albeit not being the same in which the ELTIF has invested, relate to the same asset class. This is the case, in particular, where a financial derivative instrument to hedge an exposure to a specific item is not available as a dedicated type of derivative, but rather as an item among other items included in an index which is the underlying of a financial derivative instrument. In addition, the use of financial derivative instruments might in some cases constitute a hedging strategy only if it is pursued in combination with trades in some assets, whereby that type of strategy should not be prohibited. In order to ensure that the use of financial derivative instruments solely serves the purpose of hedging the

⁶ OJ L 123, 19.5.2015, p. 98.

risks inherent to the investments of an ELTIF, the manager of the ELTIF should take all reasonable steps to ensure that the financial derivative instruments used effectively reduce the relevant risk at the ELTIF level and are also efficient in stressed market conditions. The reduction of risk should be verifiable through the use of adequate risk management systems identifying the risk intended to be mitigated and the way in which the derivative would mitigate such risk.

- (4) In situations where an ELTIF invests in assets that have different maturity profiles, the life of an ELTIF should be set with reference to the individual asset within the ELTIF portfolio which has the longest investment horizon having regard to the liquidity of that asset.
- (5) The assessment of the market for potential buyers to be included in the schedule for the orderly disposal of the ELTIF assets should take into account market risks including whether the potential buyers are typically dependent on obtaining loans from third parties, whether there is a risk of illiquidity of the assets before sale, whether there are risks associated with legislative changes, such as fiscal reforms, or political changes and whether there is a risk of deterioration of the economic situation in the market which is relevant to the ELTIF assets. No specific assessment of those risks should be requested under this Regulation for assets other than eligible investment assets since assets referred to in Article 50(1) of Directive 2009/65/EC of the European Parliament and of the Council⁷ are supposed to be liquid by their nature.
- (6) The valuation of the assets to be included in the schedule for the orderly disposal of the ELTIF assets should be carried out at a moment in time that is sufficiently close to the beginning of the disposal of the assets. However, if the ELTIF carried out a valuation in accordance with Directive 2011/61/EU of the European Parliament and of the Council⁸ at a moment in time that is sufficiently close to the beginning of the disposal of the assets, an additional valuation should not be required. Nevertheless, the preparation of the schedule for the orderly disposal of the ELTIF assets should start as soon as it is appropriate and well in advance of the time-line for its disclosure to the competent authority of the ELTIF.
- (7) The facilities to be made available to retail investors in each Member State where marketing activities are carried out by the manager of the ELTIF may be performed by one or more entities in person, by telephone or electronically, which can be the manager of the ELTIF or another entity subject to regulation governing the tasks entrusted to it by the manager of the ELTIF.
- (8) In order to avoid any potential market disruption it is necessary to give ELTIFs, which were authorised before the entry into force of this Regulation, their managers and their competent authorities sufficient time to adapt to the requirements contained in this Regulation.
- (9) The provisions on the sufficient length of the life of ELTIF should only be applied by ELTIFs submitting an application for authorisation after the entry into force of this Regulation as, pursuant to Regulation (EU) 2015/760, the length of the life of the

⁷ Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) (OJ L 301, 17.11.2009, p. 32).

⁸ Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010 (OJ L 174, 1.7.2011, p. 1).

ELTIF has to be set by the time the application for authorisation as an ELTIF is made to the competent authority of the ELTIF.

- (10) In order to allow competent authorities and managers of the ELTIFs authorised under Regulation (EU) 2015/760 before the entry into force of this Regulation to adapt to the new requirements contained in this Regulation, the date of application of this Regulation should be one year after its entry into force. The requirement on the sufficient length of the life of the ELTIF is deemed to be fulfilled under this Regulation by the ELTIFs already authorised under Regulation (EU) 2015/760 before the entry into force of this Regulation.
- (11) This Regulation is based on regulatory technical standards submitted by the European Securities and Markets Authority (ESMA) to the Commission.
- (12) ESMA has conducted open public consultations on the draft regulatory technical standards, analysed the potential related costs and benefits and requested the opinion of the Securities and Markets Stakeholder Group established in accordance with Article 37 of Regulation (EU) No 1095/2010 of the European Parliament and of the Council⁹,

HAS ADOPTED THIS REGULATION:

Article 1

Hedging derivatives

1. The circumstances in which the use of financial derivative instruments shall be considered as solely serving the purpose of hedging the risks inherent to other investments of the European long-term investment fund ('ELTIF') as referred to in Article 9(2)(d) of Regulation (EU) 2015/760 are fulfilled when they meet all of the criteria set out in paragraphs 2, 3 and 4 of this Article.
2. A financial derivative instrument shall only be used for hedging risks arising from exposures to assets referred to in Article 9(1) of Regulation (EU) 2015/760.

The purpose of hedging the risks arising from exposures to assets referred to in the first subparagraph shall only be considered to be fulfilled where the use of that financial derivative instrument results in a verifiable and objectively measurable reduction of those risks at the ELTIF level.

Where financial derivative instruments to hedge the risks arising from the exposure to the assets referred to in the first subparagraph are not available, financial derivative instruments with an underlying of the same asset class may be used.
3. The use of the financial derivative instruments aimed to provide a return for the ELTIF shall not be deemed to serve the purpose of hedging the risks.
4. The manager of the ELTIF shall take all reasonable steps to ensure that the financial derivative instruments used to hedge the risks inherent to other investments of the ELTIF reduce the risks at the ELTIF level in accordance with paragraph 2, including in stressed market conditions.

⁹ Regulation (EU) No 1095/2010 of the European Parliament and of the Council establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC (OJ L 331, 15.12.2010, p. 84).

Article 2

Sufficient length of the life of the ELTIF

For the purpose of Article 18(3) of Regulation (EU) 2015/760, the life of an ELTIF shall be considered sufficient in length to cover the life-cycle of each of the individual assets of the ELTIF where the following conditions are met:

- (a) the ELTIF aligns the date for the end of its life to the date of the end of the investment horizon of the individual asset within the ELTIF portfolio which has the longest investment horizon at the time of the submission of the application for authorisation as an ELTIF to the competent authority of the ELTIF;
- (b) any investment made by the ELTIF after the date of its authorisation as an ELTIF does not have a residual investment horizon exceeding the remaining life of the ELTIF at the time that investment is made.

Article 3

Criteria for the assessment of the market for potential buyers

For the purpose of Article 21(2)(a) of Regulation (EU) 2015/760, the manager of an ELTIF shall assess all of the following elements in relation to each asset in which the ELTIF invests:

- (a) whether one or more potential buyers are present in the market;
- (b) whether the manager of the ELTIF, based on an assessment conducted with due skill, care and diligence at the time of the completion of the schedule, expects the potential buyers to be dependent on external financing for buying the relevant asset;
- (c) where there are no potential buyers for an asset, the length of time likely to be necessary to find one or more buyers for that asset;
- (d) the specific maturity profile of the asset;
- (e) whether the manager of the ELTIF, based on an assessment conducted with due skill, care and diligence at the time of the completion of the schedule, expects the following risks to materialise:
 - (i) a risk associated with legislative changes that could affect the market for potential buyers;
 - (ii) a political risk that could affect the market for potential buyers;
- (f) the manager's assessment of whether the elements listed under points (a) and (b) may be impacted adversely during the disposal period by overall economic conditions in the market or markets relevant to the asset.

Article 4

Criteria for the valuation of the assets to be divested

1. For the purpose of Article 21(2)(c) of Regulation (EU) 2015/760, the valuation of the assets to be divested shall comply with the following criteria:
 - (a) it shall start as soon as it is appropriate and well in advance of the deadline for the disclosure of the itemised schedule for the orderly disposal of the ELTIF assets to the competent authority of the ELTIF;

- (b) it shall be concluded no more than six months before the deadline referred to in point (a).
2. Valuations made in accordance with Article 19 of Directive 2011/61/EU may be taken into account where a valuation has been concluded no more than six months before the deadline referred to in paragraph 1 of this Article.

Article 5

Specifications on the facilities available to retail investors

1. For the purposes of Article 26(1) of Regulation (EU) 2015/760, the manager of an ELTIF shall put in place facilities to perform the following tasks:
- (a) process retail investors' subscription, payment, repurchase and redemption orders relating to the units or shares of the ELTIF, in accordance with the conditions set out in the ELTIF marketing documents;
 - (b) provide retail investors with information on how orders referred to in point (a) can be made and how repurchase and redemption proceeds are paid;
 - (c) facilitate the handling of information relating to the retail investors' exercise of their rights arising from their investment in the ELTIF in the Member State where the ELTIF is marketed;
 - (d) make available to retail investors, for inspection and for the obtaining of copies of:
 - (i) the fund rules or instruments of incorporation of the ELTIF;
 - (ii) the latest annual report of the ELTIF;
 - (e) provide investors with information relevant to the tasks they perform in a durable medium as defined in Article 2(1)(m) of Directive 2009/65/EC.
2. The manager of the ELTIF shall ensure that the facilities referred to in Article 26(1) of Regulation (EU) 2015/760 have the following technical infrastructure:
- (a) they perform their tasks in the official language or official languages of the Member State where the ELTIF is marketed;
 - (b) they perform their tasks in person, by telephone or electronically.
3. The manager of an ELTIF shall ensure that the facilities referred to in Article 26(1) of Regulation (EU) 2015/760 are of the following types and have the following characteristics:
- (a) are performed by one or more entities which are either the manager of the ELTIF or a third entity subject to regulation governing the tasks to be performed;
 - (b) where the facilities are performed by a third entity, the latter receives all the relevant information and documents from the manager of the ELTIF.
 - (c) where the facilities are performed by a third entity, the appointment of the entity is evidenced by a written contract. The written contract shall specify which of the tasks referred to in paragraph 1 are not performed by the manager of the ELTIF.

Article 6

Transitional provisions

An ELTIF authorised under Regulation (EU) 2015/760 before the entry into force of this Regulation shall be deemed to fulfil the requirements set out in Article 2 of this Regulation.

An ELTIF authorised under Regulation (EU) 2015/760 before the entry into force of this Regulation shall apply Articles 1, 3, 4 and 5 of this Regulation from [OP please set concrete date: first day of the month *1 year after the entry into force of this Regulation*].

Article 7

Entry into force

This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 4.12.2017

For the Commission
The President
Jean-Claude JUNCKER