ELTIF 2.0 – European Commission proposes amendments to the ESMA draft RTS

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On 6 March 2024, the European Commission published a letter to the European Securities and Markets Authority ("**ESMA**"), in which it proposed certain amendments to the draft regulatory technical standards ("**Draft RTS**") that ESMA had previously published in relation to Regulation (EU) 2023/606 (the "**ELTIF 2 Regulation**").

Please see our separate update, here, in relation to the key takeaways from the Draft RTS published by ESMA in December 2023.

The European Commission has suggested that ESMA take a more "proportionate approach" in relation to European Long Term Investment Funds ("**ELTIFs**") and its proposed amendments are expected to be a welcome development for ELTIF managers. The key proposed amendments can be summarised as follows:

Material changes to redemption policy

Article 4(2) of the Draft RTS provides that the ELTIF manager shall inform the ELTIF's competent authority of material changes to the redemption policy as soon as practically possible, and not later than within three business days from the date that material change to the information became known or should have become known to the manager of the ELTIF.

The European Commission does not agree that ELTIF managers should be able to make such material changes without the prior authorisation of the competent authority and so has recommended that this be deleted or amended accordingly.

Minimum notice period

The Draft RTS requires a minimum redemption notice period of 12 months for all ELTIFs unless they meet certain minimum asset liquidity thresholds, irrespective of their investment strategy, assets, leverage profile and other factual specific circumstances pertaining to each individualised ELTIF in question.

The European Commission considers this to be “off-market” and that it does not take into account the “specific situation” of ELTIFs. Accordingly, it has recommended the removal of this minimum notice period of 12 months for all ELTIFs.

Liquidity requirements related to standardised notice period requirements

The Draft RTS sets out the proposed calibration of the liquidity notice period for an ELTIF based on a minimum of liquid assets. It also sets out the maximum percentage of liquid assets that the manager of the ELTIF can use to satisfy redemptions, which is based on the notice period.

Again, the European Commission considers that these requirements fail to take into account the individual situation of each ELTIF and would have a potentially adverse impact on ELTIFs which pursue certain investment strategies (including long-term private equity funds, real estate and infrastructure). The European Commission’s view is that, by failing to put forward a redemption policy and liquidity management approach that is compatible with the investment strategy of each ELTIF, ESMA’s approach in the Draft RTS does not appear to respect the scope of the legal mandate laid down by the ELTIF 2 Regulation.

The European Commission proposes that the Draft RTS should be amended and should specifically take into account the principle of proportionality, the existing market practices for retail long-term funds and the individual situation of ELTIFs.

Liquidity management tools

ESMA’s approach in the Draft RTS is to require ELTIF managers to choose and apply at least one anti-dilution liquidity management tool (e.g., anti-dilution levies, swing pricing or redemption fees). The ELTIF manager may use a different liquidity management tool only if it can justify to the ELTIF’s competent authority why this would be in the investors’ interests to do so.

The European Commission considers that this could be construed as disincentivising or limiting the possibility for ELTIF managers to implement other liquidity management tools, even where this could be equally or more compatible with the long-term investment strategy of the ELTIF. The European Commission also highlighted that it considers it unclear why ELTIFs would be treated differently from other AIFs in this regard. Accordingly, it has recommended that this be amended.

Redemption gates

Under the Draft RTS, ESMA had calibrated the redemption notice based on the redemption gate and the proportion of liquid assets in the ELTIF. The European Commission considers this to be at odds with the other liquidity provisions in the ELTIF 2 Regulation and has suggested that the Draft RTS be amended "*to ensure that the implementation and activation of redemption gates is not limited to "certain specific circumstances" or exclusively contingent on the notice period set out in the calibration table proposed by the draft RTS.*"

Common definitions, calculation methodologies and presentation formats of costs

The European Commission is proposing that the cost disclosure methodology in the Draft RTS be amended to be more consistent with that of the PRIIPs Regulation, MiFID and the AIFMD.

What does this all mean and what is next?

The European Commission's suggestions will likely be considered a positive development for fund sponsors, on the basis that it provides for an approach with more discretion and proportionality than initially proposed by ESMA in the Draft RTS. However, the final text is yet to be published and we are therefore yet to see exactly what this will look like.

If you have any questions on the ELTIF 2 Regulation, please do not hesitate to reach out to the Proskauer London Regulatory team at UKReg@proskauer.com.

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