MAPLES GROUP

UPDATE

ELTIF 2.0 - A Welcome Communication on the Draft RTS from the European Commission

The European Long-Term Investment Fund ("ELTIF") is an EU fund product regime, designed to provide long-term stable returns by investing primarily in long-term investments, such as loans, infrastructure and private equity. ELTIFs can be marketed to retail or institutional investors across the European Union. The new and improved ELTIF regime amending the European Long-Term Investment Fund Regulation[1] ("ELTIF 2.0") applies from 10 January 2024.

On 6 March 2024, the European Commission announced its intention to adopt the draft regulatory technical standards ("RTS") published by the European Securities and Markets Authority ("ESMA") on 19 December 2023, subject to ESMA making certain amendments (the "Communication").

Background

Under ELTIF 2.0, ESMA was required to develop regulatory technical standards specifying among others:

(a) the circumstances in which the use of financial derivative instruments solely serves hedging purposes;
(b) the circumstances in which the life of an ELTIF is considered compatible with the life cycles of each of the individual assets of the ELTIF;
(c) the criteria to determine the minimum holding period before redemptions may be granted;
(d) the minimum information to be provided to the competent authority of the ELTIF to demonstrate that the ELTIF has an appropriate redemption policy and liquidity management tools in place;
(e) the requirements to be fulfilled by the ELTIF in relation to its redemption policy and liquidity management tools;
(f) the criteria to assess the percentage of the ELTIF's assets to which redemptions may be limited; and
(g) the circumstances for the use of the 'matching mechanism' and information to be disclosed to investors in this regard.

The prescriptive approach that ESMA took in relation to redemptions, in particular, in the RTS has been criticised as being overly restrictive and not taking account of the broad range of asset classes and strategies that an ELTIF can pursue under ELTIF 2.0. In its current form, the draft RTS requires ELTIFs that wish to offer redemptions during their life to hold a minimum percentage of UCITS eligible assets ("Liquid Assets"). The exact minimum percentage will depend on the length of the redemption notice period offered to investors in the ELTIF – the shorter the redemption notice period the higher the percentage of Liquid Assets to be held. For example, ELTIFs that wish to offer

[1] EUR-Lex - 02015R0760-20240110 - EN - EUR-Lex (europa.eu)

redemptions on a quarterly basis, with a notice period of less than six months would need to maintain 40% Liquid Assets. This level of Liquid Assets is widely seen as excessive and inconsistent with the long-term nature of ELTIFs investments. More fundamentally, it caused managers to pause to reconsider whether the ELTIF 2.0 could support their proposed investment strategy and planned portfolio composition.

European Commission Communication

The European Commission took stock of industry concerns on the RTS and:

(a) reaffirmed its wish for ELTIF 2.0 to have the greatest possibility for success;
(b) reiterated that one of the key objectives of ELTIF 2.0 is to provide flexibility to ELTIF managers to pursue a broad range of strategies and objectives;
(c) noted that the RTS does not sufficiently cater for the individual characteristics of different ELTIFs;
(d) called on ESMA to take a more proportionate approach, particularly to the calibration of redemptions and liquidity management tools; and
(e) requested amendments to notice periods, redemptions, liquidity management tools, redemption gates and disclosure of costs.

European Commission's Requested Amendments to the RTS

Notice Periods and Redemptions

The European Commission:

(a) requested the deletion of the mandatory 12-month notice period;
(b) noted that the operation of notice periods calibrated based on minimum percentages of liquid assets subject to a maximum percentage of redeemable assets in the draft RTS does not respect the scope of the legal mandate granted to ESMA under ELTIF 2.0; and
(c) requested ESMA to amend liquidity related requirements, specifically taking into account the principles of proportionality, existing market practices and individual situations of ELTIFs.

It indicated that this can be achieved by targeted amendments which determine the liquidity profile of the ELTIF through the appropriate and proportionate calibrated application of:

(a) the maximum percentage of available Liquid Assets to meet redemptions and the redemption frequency ("Option 1"). Under this option, the longer the redemption notice period, the greater the percentage of Liquid Assets that can be used to meet redemptions; or
(b) the minimum percentage of Liquid Assets that must be maintained subject to a maximum percentage of Liquid Assets being available to meet redemptions and the redemption frequency ("Option 2"). Under this option, depending on the redemption frequency, a certain minimum percentage of Liquid Assets must be maintained and out of this percentage a maximum percentage of Liquid Assets can be used to meet redemptions. The longer the notice period, the greater percentage of Liquid Assets that can be used.

The possibility of two different options is a welcome proposition and it is important that discretion remains with the ELTIF manager to determine which option is best aligned with its liquidity profile, investment approach and investor base.

Liquidity Managements Tools (LMTs)

The European Commission requested that ESMA amend the draft RTS so it does not introduce additional ELTIF specific requirements beyond those specified in Article 18(2) of ELTIF 2.0 or otherwise limit the capacity of ELTIF managers in selecting and implementing LMTs.

Redemption Gates

The European Commission indicated that it believes ESMA went beyond its legal mandate when setting the rules. It requested that ESMA amend the draft RTS 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 of the draft RTS.

Costs

The European Commission is of the view that the draft RTS introduce cost disclosure methodologies that are different to the PRIIPs, MIFID II and AIFMD requirements and requested that ESMA amend the draft RTS to address the European Commission's concerns and ensure better alignment of ELTIF 2.0 cost disclosure requirements with PRIIPs, MIFID II and AIFMD requirements.

Timing

Within a six-week period (ending on 17 April 2024) from the publication of the Communication, ESMA 'may' amend the draft RTS on the basis of the European Commission's proposed amendments and resubmit it in the form of a formal opinion to the European Commission.

If within this six-week period ESMA does not submit amended draft RTS or submit a draft that is inconsistent with the European Commission's proposed amendments, the European Commission may adopt the RTS with the amendments it considers relevant or it may reject the RTS.

What does it mean for your ELTIF project?

Luxembourg

At this stage, if you consider submitting an ELTIF file for approval to the Luxembourg regulator, the *Commission de surveillance du secteur financier* (the "CSSF"), you may already take into consideration the RTS. However, you are not obliged to do so at present. The CSSF currently accepts submissions that are solely and entirely based on ELTIF 2.0. You should in any case consider the CSSF's ELTIF questionnaire[2] and ensure that all elements covered therein are properly addressed.

Additionally, you will have to include a risk warning in the ELTIF's offering document to highlight that the final RTS are not yet available and that the ELTIF's documentation may have to be amended once those final RTS are published.

Ireland

The Central Bank of Ireland (the "CBI") has been in a position to accept applications for the authorisation of ELTIF 2.0s since 11 March 2024.

The CBI's consideration of semi-liquid ELTIFs will be undertaken on a case-by-case basis, with a particular focus on understanding the redemption policy and liquidity management

[2] Request for a European Long-Term Investment Fund (ELTIF) – CSSF

tools of an ELTIF, in line with Article 18(2)(b) of ELTIF 2.0. Another area of focus is on how ELTIFs plan to align with the final RTS once effective and how this could impact investors where the liquidity terms are less favourable.

Further Information

If you would like to: (i) receive more information on the recent developments in relation to ELTIF 2.0, the RTS and / or the Communication; (ii) discuss any legal, practical and / or operational challenges with the RTS; or (iii) obtain guidance on how to best prepare your ELTIF documentation in light of the current status quo, please reach out to your usual Maples Group contact or any of the contacts below.

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