LEGAL UPDATE

Amendment to Act on Collective Investment as the CBDF Implementation in Slovakia

New rules for UCITS / AIF distribution in Slovakia

ČECHOVÁ & PARTNERS
advokáti attorneys

On 4 May 2021, the Slovak Parliament approved an amendment to Act No. 203/2011 Coll. on Collective Investment, as amended (the "**Act on Collective Investment**") which was published as Act No. 210/2021 Coll. (the "**Amendment**"). The main goal of the Amendment is to implement the CBDF Directive and also to implement the rules on initial capital of management companies stipulated by Directive 2019/2034 into Slovak legislation. The legislator also took this opportunity to amend and clarify certain other provisions regulating AIFs and UCITS in Slovakia. In line with the CBDF Directive transposition deadline, the rules transposing the CBDF Directive will come into force on 2 August 2021, while the rules on the initial capital of management companies became effective on 26 June 2021.

Pre-marketing rules

In line with the CBDF, the Amendment introduces pre-marketing rules for AIFs (the application of pre-marketing only to AIFs is fully in line with the CBDF, while under the CBDF, the Commission shall evaluate within three (3) years whether the pre-marketing should apply also to UCITS). Slovak law has not contained any explicit regulation of pre-marketing of AIFs or UCITS so far and the definition of "distribution" was broad enough to potentially catch also very early stages of contact between the investor and manager/distributor (even the stages way before the binding offer or subscription could be made). From this perspective, the explicit regulation of pre-marketing is welcomed since before the Amendment, the activities falling under "pre-marketing" stage were largely not allowed to be conducted in Slovakia.

Under the Amendment, definition of pre-marketing, as well as, the rules on how the pre-marketing should be conducted are materially the same as those stipulated by the CBDF Directive, i.e., there is no notable gold-platting in the Amendment. The pre-marketing rules apply only to Slovak AIFMs and EU AIFMs (i.e., AIFMs having seat in the EEA Member State and being authorized in accordance with AIFMD) and the third-country AIFMs cannot take advantage of these new provisions.

No prior notification to the National Bank of Slovakia (the "**NBS**") as a local regulator on the content or the addressees of pre-marketing is needed for Slovak AIFMs or EU AIFMs. However, in line with the CBDF, Slovak AIFMs are obliged to notify the NBS in paper or electronic form on the relevant details of pre-marketing within two weeks since they have begun pre-marketing (in line with Article 30a (2) of the CBDF). The NBS will then inform the local regulators of the relevant EU Member States.

Slovak or EU AIFMs can engage in pre-marketing via third parties provided that such a third party is an investment firm, foreign investment firm, bank, foreign bank, UCITS management company, another AIFM, or a tied agent.

Interestingly, unlike the obligation under Article 30a (4) of the CBDF stating that pre-marketing should be (only) adequately documented, the Amendment stipulates that Slovak and EU AIFMs shall keep records of all activities conducted within pre-marketing.

Facilities of foreign UCITS and AIFMs when distributing units in Slovakia

The obligation to make available facilities by UCITS reflects the Article 92 of the UCITS Directive (as amended by the CBDF). In line with the CBDF, Slovak law requires neither a physical presence of EU UCITS in Slovakia, nor an appointment of a third-party facilities agent (however, the physical presence and the appointment of facilities agent for EU UCITS were not mandatory prior to implementing the CBDF either). In any case, for distributing units in Slovakia, EU UCITS can use a facilities agent (being a third party who is authorized to conduct the respective activity in Slovakia – typically a bank, investment firm or an independent or tied financial agent or tied investment agent) to ensure that the facilities are made available in Slovakia in accordance with Article 92 of the UCITS Directive in which case a written contract must be concluded with such a facilities agent specifying which of the tasks are not to be performed by

the UCITS and that such third party will receive all the relevant information and documents from the UCITS.

Similarly, the Amendment also transposed the requirements that the facilities should be made available to retail investors in AIFs in Slovakia. The Amendment materially reflects the Article 43a of the AIFMD (as amendment by the CBDF Directive). No physical presence or appointment of facilities agent is necessary, although, of course, facilities agent can be appointed by a written agreement with AIFM. Before the Amendment, the AIFMs distributing AIFs to retail investors had to either conduct these facilities tasks via their organizational unit located in Slovakia or via a facilities agent (which could be certain financial institution having physical presence in Slovakia). Conclusion of any written agreement with the facilities agent must be notified without a delay to the NBS.

De-notification of distribution of UCITS and AIFs

The Amendment newly introduces uniform conditions under which (i) a Slovak manager of UCITS or AIF can withdraw its passport notification regarding the distribution of these funds in the territory of another EU Member State and (ii) similar conditions under which EU UCITS can withdraw its passport notification regarding the distribution of these funds in Slovakia, as well as, (iii) the rules stating the effects of the de-notification of the EU AIFs on their distribution in Slovakia.

De-notification of distribution of UCITS and AIFs was not previously known to Slovak law and its new regulation materially reflects the requirements stated in the CBDF Directive.

Changes in notification of changes to regulatory authorities and the NBS

The Amendment specified that both, Slovak UCITS distributing their units in other Member States, as well as, EU UCITS distributing their units in Slovakia, are obliged to notify the changes in the distribution of their units to the NBS or the foreign regulator (in case of Slovak UCITS distributed in other Member States) within one (1) month prior to such change. Although this obligation existed also prior to the CBDF implementation, there was no specific time period in which the notification should be made. Similar obligation exists for the Slovak AIFM, but in case of the Slovak AIFM, the time period for such notification of change was introduced before the Amendment already.

If the planned change meant that the management of the UCITS and AIFs would no longer comply with the Act on Collective Investment, the NBS will inform the management company within 15 working days that the planned change cannot be implemented. If the change was implemented regardless the NBS instruction, the NBS is authorized to impose certain sanctions, such as prohibiting the marketing of the units of the collective investment fund in Slovakia or imposing a fine.

Changes introduced to the sanction regime

The Amendment also introduced several amendments to sanction regime that extends the available sanctions and enables the supervision authorities to impose these sanctions to a broader category of subjects.

Interestingly, the Amendment introduced a new sanction – *"dissolution of entity with liquidation by the court upon the proposal by the NBS"* – which can be imposed on entities that carry out unauthorized activity of collective investment in Slovakia. This sanction may be imposed only once the relevant entity continues in carrying out collective investment contrary to the Act on Collective Investment despite it was sanctioned for such a conduct by the NBS already. In practice, we are of the opinion that this sanction can probably be enforced only

against entities established under Slovak law (as the dissolution of an entity established under foreign law can hardly be ordered by a Slovak court).

Furthermore, under the Amendment, the sanction regime is extended in terms of the entities to which sanctions may be imposed and applies to:

(a) Third-party entities which enable or facilitate another person or entity to conduct the collective investment contrary to the Act on Collective Investment via its propagation (however, the sanction of "dissolution" cannot be imposed on such an entity);
(b) AIFMs falling under special regulatory regime under Article 3(2) of AIFM Directive will also fall under sanction regime of the NBS – before the Amendment, they were not subject to sanction regime (here, also the sanction of *"dissolution of the entity with liquidation by the court upon the proposal by the NBS"* could potentially be imposed on this entity).

Newly extended information and investigation powers of the NBS

The Amendment explicitly extended the powers of the NBS when investigating even only suspected unauthorized collective investment activity in Slovakia. In case of such an investigation, the NBS is authorized to:

(a) Request from the respective person/entity the information, documents, and explanations, while the respective person/entity is obliged to provide these to the NBS in the requested form, structure and deadline;
(b) To conduct on-site inspection and verify the information, documents, and explanations directly at the site of the respective person/entity;
(c) The respective entity is obliged to provide to the NBS the requested collaboration and assistance;
(d) The respective person/entity being suspected of unauthorized collective investment activity in Slovakia will have in this process the status, rights and obligations of a (already) supervised entity.

Own funds requirement of the AIFM

Under transposition of Article 60 and 61 of Directive 2019/2034, own funds of the UCITS / AIFM must satisfy the requirement under Article 13 of Regulation 2019/2033 (fixed overheads requirement). Unlike the rest of the changes brought by the Amendment (becoming effective from 2 August 2021), this change became effective on 26 June 2021 already.

Form and activities of a real estate companies

According to the currently effective Act on Collective Investment, real estate companies active in Slovakia can either be (i) Slovak real estate companies having a form of a joint-stock company or (ii) foreign real estate companies, regardless of their form. After the Amendment becomes effective, the requirement for Slovak real estate companies to have a form of a joint-stock company will no longer apply, thus Slovak real estate companies will be capable of having also other business forms.

Furthermore, the scope of secondary activities that a real estate company can perform is being expanded. Prior to the Amendment, the real estate companies could besides the basic activities (such as acquiring and selling real estate, administration and lease of real estate together with provision of services related to the lease, intermediation of purchase, sale and lease of real estate) stipulated by law conduct only the activities that are necessary for these basic activities. According to a new wording introduced by the Amendment, this should be now changed and the real estate companies can conduct activities related to the basic activities. According to the reasoning report to the Amendment, this extension was introduced to reflect the needs showed

by the application practice. Now, the real estate companies should be able to conduct also other activities which, although strictly not necessary for the performance of the basic activities, are accessory services to the basic activities, such as cleaning services, lease of movables things, market and public opinion surveys, advertising and marketing services, administrative services, etc.

Other changes

Clarification of the scope of application of collective investment regulation with regard to raising funds for manufacturing/research/service-providing activity.

The Collective Investment Act previously stipulated that the regulation should not apply to raising of funds for purposes of financing the manufacturing or research activity or provision of services if such activities are predominantly financed by the person who raises the funds. In the view of the legislator, the requirement on the portion of own funds was not a transposition of any EU law (but rather a local specific) and created obstacles in practice in obtaining financing and thus this requirement is now cancelled by the Amendment. The deletion of the whole provision should now enable raising the funds for manufacturing/research/service-providing activity without a need of ensuring that the activity is predominantly financed by own funds (and thus it should be now easier not to be caught by collective investment regime). This is not an implementation of the CBDF.

Stricter rules on application of collective investment regime.

So far, the conducting of collective investment was prohibited if not being in accordance with the collective investment regulation. The legislator now extended this prohibition also to any facilitation or enabling the conducting of collective investment via propagation or other means of ensuring such activity (this is also reflecting in the extension of the sanction regime and extending the supervision power of the NBS, as described above).

Lowering the authorization requirements for the special qualified investors' fund.

The creation of special qualified investors' fund (its units may be distributed only to the professional clients or the investors who invest at least EUR 50,000) no longer requires an authorization from the NBS, only a registration in the list of supervised entities is required and sufficient under the Amendment.

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This legal update is not a legal advice and was prepared by Miroslav Zaťko, attorney (miroslav.zatko@cechova.sk) and Simona Haláková, partner (simona.halakova@cechova.sk) of ČECHOVÁ & PARTNERS banking & finance legal team. The legal update was prepared on 15 July 2021 and posted on 16 July 2021.

For more details or specific legal advice on the topic please do not hesitate to contact our banking & finance team members.