



**DIRECTOR OF THE SUPERVISION SERVICE
BANK OF LITHUANIA**

**DECISION
ON THE POSITION OF THE BANK OF LITHUANIA
REGARDING CERTAIN REQUIREMENTS FOR MARKETING OF UNITS
OF FOREIGN ALTERNATIVE COLLECTIVE INVESTMENT UNDERTAKINGS
TO RETAIL INVESTORS IN THE REPUBLIC OF LITHUANIA**

9 March 2020 No V 2020/(21.25.E-2100)-241-50
Vilnius

Acting in accordance with Article 42(4)(1) of the Republic of Lithuania Law on the Bank of Lithuania and subparagraph 5.8 of the Regulations of the Supervision Service of the Bank of Lithuania approved by Order No V2012/(1.7-0202)-02-100 of the Chairman of the Board of the Bank of Lithuania of 28 March 2012, I hereby d e c i d e :

To approve the position of the Bank of Lithuania regarding certain requirements for marketing of units of foreign alternative collective investment undertakings to retail investors in the Republic of Lithuania (attached).

Director of the Prudential Supervision Department,
Deputising for the Director of the Supervision Service

Renata Bagdonienė

APPROVED
by Decision No V 2020/ (21.25.E-2100)-241-50
of the Director of the Supervision Service
of the Bank of Lithuania
of 9 March 2020

**POSITION OF THE BANK OF LITHUANIA REGARDING CERTAIN REQUIREMENTS
FOR MARKETING OF UNITS OF FOREIGN ALTERNATIVE COLLECTIVE INVESTMENT
UNDERTAKINGS TO RETAIL INVESTORS IN THE REPUBLIC OF LITHUANIA**

The Republic of Lithuania Law on Managers of Alternative Collective Investment Undertakings (hereinafter – the Law) recasting the Republic of Lithuania Law on Management Companies of Collective Investment Undertakings Intended for Professional Investors entered into force on 1 February 2019. One of the key amendments to this Law is the provided possibility of marketing units or shares (hereinafter jointly – units) of foreign alternative collective investment undertakings (hereinafter – foreign ACIUs) to retail investors in the Republic of Lithuania. In view of the importance of this regulation and the need to expand the capital market, the position of the Bank of Lithuania has been prepared in order to achieve greater legal clarity and uniform practices among market participants.

In accordance with Article 43 of 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 (hereinafter – the Directive), the EU Member States may allow managers of ACIUs (hereinafter – ACIUMs) to market units of their managed ACIUs to retail investors in their territory in accordance with the Directive, irrespective of whether units of those ACIUs are marketed on a domestic or cross-border basis or whether these are EU or non-EU ACIUs. The Member States should in such cases be able to impose stricter requirements on ACIUMs or ACIUs compared to those for units of ACIUs marketed to professional investors in their territory in accordance with the provisions of the Directive. However, the Member States may not impose stricter or additional requirements on EU ACIUs established in another Member State whose units are marketed on a cross-border basis than those imposed on ACIUs whose units are marketed domestically.

In light of the provisions of the Directive and in order to extend the possibilities for retail investors to invest in units of foreign ACIUs in the Republic of Lithuania and to create legal conditions for such investment opportunities that are already available to retail investors of other Member States, Article 43 of the Law sets out the conditions under which units of foreign ACIUs may be marketed to retail investors in the Republic of Lithuania.

The Law stipulates that an ACIUM must obtain an authorisation from the competent supervisory authority, namely the Bank of Lithuania, to market units of a foreign ACIU to retail investors in the Republic of Lithuania. This authorisation shall be granted subject to fulfilment of the following key conditions:

- the ACIUM shall hold an ACIUM licence according to the Directive;
- units of the ACIU shall be marketed to retail investors in its home Member State;
- the ACIU shall comply with the requirements applicable to special collective investment undertakings (SCIUs):
 - if units of the ACIU are marketed on a regulated market or a multilateral trading facility registered in the Member State, the investment strategy of the ACIU must comply with the requirements set out in the Republic of Lithuania Law on Collective Investment Undertakings (hereinafter – the CIU Law) as regards investment objects and diversification;
 - the investment strategy of another ACIU than referred to above must satisfy the requirements for SCIUs set out in the CIU Law as regards investment objects, diversification, leverage (borrowing), information provided to investors and implementation of investors' rights;
 - the ACIU's key investor information document must be drawn up in the Lithuanian language;
 - documents proving compliance with the specified circumstances must be submitted to the Bank of Lithuania.

In view of the fact that units of foreign ACIUs may be acquired by retail investors, i.e. persons who do not have the necessary experience and expertise in the field of investment in order to be able to make independent investment decisions on financial instruments of varying

complexity and to properly assess the risks involved, it is crucial to take the necessary measures to ensure that these investments are as secure as possible and that high-level protection of investor rights is applied, equivalent to that of retail investors when they acquire units of SCIUs established in the Republic of Lithuania. It should be noted that the suitability of units of foreign ACIUs, as a security and soundness aspect of an investment instrument, for a retail investor shall, first of all, be ensured by the fact that foreign ACIUMs hold a licence of an ACIUM in accordance with the Directive, i.e. the activities of a foreign ACIUM are subject to the highest professional standards and the liability requirements laid down in Commission Delegated Regulation (EU) No 231/2013 of 19 December 2012 supplementing Directive 2011/61/EU of the European Parliament and of the Council with regard to exemptions, general operating conditions, depositaries, leverage, transparency and supervision, while its activities shall be supervised by a competent foreign supervisory authority. Secondly, assets of such foreign ACIUs must be invested and the portfolio of investment instruments diversified in observance of the same principles and requirements as those applicable to SCIUs established in the Republic of Lithuania. Thirdly, the scope of the information provided to investors by foreign ACIUs and the exercised rights must correspond to the level of SCIUs established in the Republic of Lithuania, while the material information (key investor information document) must be drawn up and made available to investors in the Lithuanian language.

One of the set conditions to be met by a foreign ACIU whose units may be acquired by retail investors in the Republic of Lithuania is compliance of the investment objects and diversification of the ACIU in question with the requirements applicable to SCIUs in the Republic of Lithuania. Section 1 of Chapter 8 of the CIU Law lays down detailed requirements for diversification of investment objects and investment instrument portfolios. For example, assets of real estate SCIUs may consist only of land, buildings and/or premises forming a separate real estate item and other assets referred to in Article 140(1) of the CIU Law (including the investment instruments referred to in Articles 79, 83 and 84 of the CIU Law); assets of real estate SCIUs must consist of at least four separate real estate items. The requirements for diversification of investment instrument portfolios of real estate SCIUs are laid down in Article 141 of the CIU Law, e.g. a maximum of 30% of the net asset value of a SCIU may be invested in a single real estate item; however, if this item is classified as real estate under construction, the total investment in such items may not exceed 20% of the net asset value. Detailed requirements are also laid down for other types of SCIUs.

The investment strategy of a specific SCIU, including investment objects, as well as investment restrictions shall be set out in the instruments of incorporation of that SCIU (Article 70(2)(3) and Article 76(1)(4) of the CIU Law). In accordance with the provisions of the CIU Law, a SCIU may commence its activities only subject to obtaining an authorisation from the Bank of Lithuania to approve the instruments of incorporation of the SCIU and to choose a depositary (Article 8(1) of the CIU Law). This authorisation shall be granted only if the Bank of Lithuania, after carrying out a detailed assessment of the information and documents submitted by the manager of the SCIU, establishes that this information and documents, including the instruments of incorporation, comply with the requirements of the applicable legislation and that there are other circumstances under which such authorisation shall be granted (Article 8(4) of the CIU Law). During the subsequent period, i.e. when the SCIU is already in operation, compliance with the applicable requirements shall be assessed both by granting the authorisations referred to in Article 20 of the CIU Law and by carrying out supervisory actions, e.g. inspections of compliance of both the instruments of incorporation, other documents and the actual situation of the SCIU with the applicable requirements (Article 164 of the CIU Law). It should be noted that foreign ACIUs whose managers seek to have units of these ACIUs marketed to retail investors in the Republic of Lithuania usually are not newly established entities and have a history of their activities and factual data that objectively disclose whether a certain foreign ACIU complies with the applicable requirements.

As mentioned above, EU legislation does not impose requirements on investment objects, diversification and the content of the instruments of incorporation of ACIUs whose units are marketed to retail investors, leaving these matters to national jurisdictions. It is therefore evident that these aspects are regulated differently in different countries and it is likely that there are no two jurisdictions with identical requirements. Accordingly, ACIUs whose units are marketed to

retail investors in foreign countries must comply with the national requirements of both their home and foreign countries. In view of the diversity of national regulations, such an interpretation of the provisions of the Law that, in order to market units of foreign ACIUs to retail investors in the Republic of Lithuania, the national requirements of the Republic of Lithuania concerning investment objects and diversification must be transposed into the instruments of incorporation of ACIUs and that those obligations shall not be assumed on the basis of other documents mandatory for foreign ACIUMs would, in principle, imply a rather theoretical possibility of marketing of foreign ACIUs' units to retail investors in the Republic of Lithuania. This is particularly difficult to implement in practice, if not impossible, and the legal regulation would not achieve its objectives. The requirements set out in Article 43 of the Law are intended to extend the possibilities for retail investors to invest in units of foreign ACIUs, while ensuring protection of the rights of retail investors in the Republic of Lithuania and an acceptable level of security for their investments. It should be noted that compliance of foreign ACIUs with the requirements for investment objects and diversification applicable to SCIUs confirms that the level of risk (investment security) of the ACIU in question is essentially equivalent to that which is acceptable for SCIUs established in the Republic of Lithuania.

It should be noted that any planned material changes in information referred to in Article 43(3) of the Law, including changes related to the requirements for investment objects and diversification, must be notified to the Bank of Lithuania by foreign ACIUMs in advance, but no later than within one month before the date of implementation of the planned changes. Having established that the requirements set out in Article 43 of the Law will not be met in case such changes are implemented, the Bank of Lithuania shall immediately inform the foreign ACIUM that it will not be in a position to implement the planned changes (Article 43(9) of the Law). Foreign ACIUMs must immediately inform the Bank of Lithuania of the fact of an unplanned material change to the specified information. If, as a result of the change, the requirements laid down in Article 43 of the Law cannot be met, the Bank of Lithuania shall require to terminate any activity which infringes the provisions of the Law or its implementing legislation and, if necessary, take other steps as laid down in Article 58 of the Law, e.g. issue a mandatory instruction to suspend marketing of units of foreign ACIUs or take other actions in order to eliminate infringements of legal acts (Article 43(10) of the Law).

Having regard to the requirements laid down in the Law, their objectives and the principles deriving from EU legislation, prior to taking a decision on granting authorisation to market units of a foreign ACIU to retail investors in the Republic of Lithuania and determining the foreign ACIU's compliance with the requirements for investment objects and diversification as applicable to SCIUs, the Bank of Lithuania will assess the following:

- the actual composition of the foreign ACIU's investment instrument portfolio and its compliance with the requirements for investment objects and diversification applicable to SCIUs of the relevant type as laid down in the CIU Law, except for cases where the foreign ACIU was established not earlier than six months before the date of submission of the application to the Bank of Lithuania for granting an authorisation to market units of the foreign ACIU to retail investors in the Republic of Lithuania. This exemption shall not apply if the foreign ACIUM indicates that the ACIU's investment instrument portfolio has already been formed;
 - the requirements for diversification of the investment objects comprising the assets of the ACIU and the ACIU's investment instrument portfolio as set out in the documents of the foreign ACIU and ACIUM, including the ACIU's instruments of incorporation and the ACIUM's internal documents (e.g. mandatory rules and procedures). The assessment will cover the entirety of the requirements set out in the documents submitted by the foreign ACIUM. In other words, the requirements set out in these documents must clearly and unequivocally confirm that the foreign ACIUM is obliged to comply with the requirements for investment objects and diversification laid down in the CIU Law with regard to the relevant type of a SCIU and to apply them to its managed ACIU, units of which are marketed to retail investors in the Republic of Lithuania. It should also be noted that foreign ACIUMs shall inform the Bank of Lithuania of any changes in accordance with Article 43(9) and Article 43(10) of the Law.
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