Fondbolagens förening
SWEDISH INVESTMENT FUND ASSOCIATION

25-06-06

The Swedish Investment Fund Association's reply to the "Proposed Regulatory Technical Standards in the context of the EBA's response to the European Commission's Call for advice on new AMLA mandates"

The Swedish Investment Fund Association (SIFA) wishes to submit the following comments regarding the EBA's proposal for Article 21 of the "Draft RTS under Article 28(1) of the AMLR on Customer Due Diligence".

The association expresses strong concerns regarding the formulation of Article 21 in the EBA's draft RTS on customer due diligence measures, as it would, effectively dismantle the current Swedish fund distribution model, under which fund management companies are not entitled to access the customer registers of investment firms. The proposed provision would render fund distribution through independent distributors in Sweden practically unfeasible.

Fund distribution and the draft Article 21

The wording of draft Article 21 is unclear and difficult to interpret – particularly the phrase "when a collective investment undertaking is acting in his own name, but for the benefit of its underlying investors." This does not reflect the actual structure of fund distribution as practiced, for example, via fund platforms. In such models, the fund does not act in its own name. Rather, it is the distributor – typically an investment firm or a credit institution – that acts in its own name, both in relation to the end-investor and the fund management company. The distributor enters into a contractual relationship with the customer and is therefore responsible for conducting customer due diligence under applicable AML regulations.

There is no contractual relationship between the fund management company and the distributor's client, nor is there necessarily an agreement between the fund management company and the distributor itself. Accordingly, the distributor does not act on behalf of the fund management company, but independently and in its own name. This principle has recently been reaffirmed in both the UCITS Directive (Article 13(3)) and the AIFMD (Article 20(6a)) [1], which explicitly state that marketing functions "performed by one or several distributors who are *acting on their own behalf* [...] shall not be considered to be a delegation."

The Swedish fund market is highlighted by the European Commission as a model, not least for its role in fostering broad-based and extensive fund savings among households. This is reflected in both the Retail Investment Strategy (RIS) and the Strategy for a Savings and Investments Union (SIU). Against this background, it appears particularly unfortunate that the current proposal for Article 21 of the EBA's draft technical standards risks causing serious damage to the very market that is held up as an example in other contexts.

[1] Directive (EU) 2024/927 of the European Parliament and of the Council of 13 March 2024 amending Directives 2011/61/EU and 2009/65/EC as regards delegation arrangements, liquidity risk management, supervisory reporting, the provision of depositary and custody services and loan origination by alternative investment funds.

One of the features of the Swedish fund market is that shares or units of funds are marketed from a wide range of distributors (investment firms and credit institutions). They in turn market a wide range of funds from different fund managers and are acting independently from the fund management companies. This has proven very beneficial for retail investors. The marketing of funds through these distributors is structured in the same way as stock trading. This means that it is the full responsibility of the distributor to conduct customer due diligence. There is no customer relationship between the fund management company and the customers of the distributor. Instead, the distributor – acting in its own name – is the customer of the fund management company. The distributor is noted in the shareholder register. Fund management companies routinely verify and monitor that the distributor, in turn, has the necessary procedures in place to prevent money laundering and the financing of terrorism.

In Sweden, the Financial Supervisory Authority (Finansinspektionen) license investment firms and credit institutions to be registered in the shareholder register.[2] In practice this means that the fund management company will register the licensed distributor in the shareholder register. The fund management company's register of shareholders should not be confused with an account. The fund management company does not provide the client with an account. The distributors will keep a record of their customers' holdings and there is no legal right for the fund manager to gain access to the distributor's customer register.

Now, the proposed Article 21 indicates that a collective investment undertaking[3] should fulfil the requirement under Article 20(1)(h) of Regulation (EU) 2024/1624 "by being satisfied that the intermediary will provide CDD information and documents on the underlying investors" upon request. Such requirement could only be fulfilled by entering an agreement with the distributor. As previously mentioned, there is no obligation for a fund management company to have an agreement with a distributor acting in its own name. Such an obligation can in our opinion reasonably not be introduced through level 2 measures under Regulation (EU) 2024/1624. The obligation to have an agreement would in itself become a heavy burden to fund managers. For ETF:s one of the major efficiency advantages would then be lost. Also, the recent changes to the UCITS Directive and the AIFMD clarifies that there should be no such obligation.

If such obligation were introduced in EU law it would mean that distributors acting in their own name under license from the Supervisory Authorities would have to reveal their customer register to the fund managers at the fund managers request. For these firms, acting independently from the fund managers, the customer register would be seen as their most valuable asset. From a commercial perspective it will not be practically feasible to reveal the customer register to the fund management company, as the latter is a competitor to the distributor. The fund management company will have its own distribution channels (i.a. fund platform or discretionary portfolio management) and customers, therefore competing with the distributor. This is why the Swedish legislator has ensured that fund managers do not have the right to access distributors client register.[4] Thus, a requirement – as we understand the proposed Article 21 – that would oblige the distributor to reveal the identity of their clients will in practice disrupt the successful Swedish model for fund distribution.

[2] License to be registered as manager of units or shares | Finansinspektionen
[3] It should be noted that collective investment undertakings themselves often have no legal capacity (only the manager of such undertakings).
[4] Chapter4 § 12 of the Swedish UCITS Act (2024:46).

The association questions whether it was ever the legislator's intent, through the AML Regulation, to fundamentally alter the conditions for fund distribution. It is also noteworthy that no corresponding obligation is proposed for listed companies to conduct due diligence on end investors, thereby creating a regulatory asymmetry between issuers of financial instruments.

The negative consequences of the proposed requirement will be severe. Moreover, it is most unlikely that the requirement would have any effect on the prevention of money laundering or terrorist financing. The provision thus appears inconsistent with the risk-based approach underpinning the EU's AML/CFT regime. The distributor, as being a financial institution, will be fully responsible for conducting customer due diligence, and in a much better position to do so than the fund manager. The fund management company have no relationship, or agreement, with the distributors' customers. It will not be in a position to conduct any meaningful due diligence of the distributors' customers, only based on a list of natural persons received from the distributor. The requirement is therefore not proportionate.

Legal prerequisites

When it comes to the legal basis for the requirement, Article 21 is supposed to be a simplified measure in relation to Article 20(1)(h) of Regulation (EU) 2024/1624. Article 20(1)(h) states that customer due diligence includes "where a transaction or activity is being conducted on behalf of or for the benefit of natural persons other than the customer, identifying and verifying the identity of those natural persons". It is unclear which situations are covered by "being conducted on behalf of or for the benefit of natural persons than the customer" and what the paragraph is aiming at. SIFA cannot find any impact assessment or any text that indicates that fund distribution should be the target of this requirement. Instead, recital 51 indicates that it addresses situations like "where credit institutions or financial institutions provide accounts to legal professionals for the purposes of receiving or holding their client's funds". The recital also vaguely states that "In the context of customer due diligence, the person for the benefit of whom a transaction or activity is carried out does not refer to the recipient or beneficiary of a transaction carried out by the obliged entity for their customer".

SIFA do not see any indication that it was the intention of the legislators to cover fund distribution. It is therefore questionable whether EBA and the Commission should specifically address this issue, having in mind the severe and unintended consequences it will have. Even though the proposed Article 21 is intended as a relief (simplified measures), it will in practice totally change the notion of fund distribution. It also builds on the perception that Article 20(1)(h) of Regulation (EU) 2024/1624 actually cover situations as the one we have described, where a fund distributor acts in its own name and under its own responsibility, which there is no evidence of.

It rather appears that the draft Article 21 seeks to codify Article 16.20 of the EBA's ML/TF Risk Factors Guidelines (EBA/GL/2024/01), which addresses the scenario described in Article 16(2)(c) of the same guidelines. However, the existence of a legal mandate for such codification is highly questionable. If provisions from non-binding guidelines are to be transformed into binding regulatory standards, this requires not only a clear legal basis but also robust justification, including a comprehensive impact assessment that demonstrates both necessity and proportionality.

Furthermore, it is doubtful whether the sharing of personal data between the distributor and the fund management company is compatible with the GDPR. Anti-money laundering efforts may serve the public interest, but credit institutions cannot rely on this legal basis for data sharing, due to the absence of a clear legal framework permitting such disclosure. Such regulation must include specific safeguards and comply with the fundamental requirements of necessity and proportionality.

In light of the fact that fund distribution, where the distributor acts in its own name and under its own responsibility, does not appear to fall within the scope of Article 20(1)(h) of Regulation (EU) 2024/1624, we respectfully suggest that Article 21 be either removed or subject to further clarification. It should then be clarified that Article 21 only aims at situations where the intermediary credit or financial institution does not act in its own name and under its own responsibility. It should be clarified that in those cases the transaction or activity is not considered as conducted on behalf of or for the benefit of natural persons other than the customer.

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