



CROSS-BORDER DISTRIBUTION OF FUNDS IN EUROPE

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1 - Rationale and timeline of the legislative initiative

□ A legislative proposal inspired by CMU, anticipating the forthcoming review of AIFMD

- Despite harmonisation brought about by UCITS and AIFMD, there remains barriers hampering managers' ability to benefit from the internal market
- Objective simplify the cross-border distribution of UCITS and AIFs by removing certain identified barriers

□ A legislative proposal consisting of a Directive (D) and a Regulation (R) negotiated within a year

- Proposal for a Regulation and a Directive published: **12 March 2018**
- Council general approach reached: **20 June 2018**
- ECON vote on Rapporteur's report (Wolf Klinz, ALDE): **3 December 2018**
- Trilogues concluded **27 February 2019**
- Next steps: EP Plenary vote (**16 April 2019**), lawyers-linguists review, publication at OJ (summer 2019)

□ Application: 2 years after entry into force (**summer 2021**)

2 - Marketing communications (R)

- **General requirement for asset managers to ensure that marketing communications**
 - are fair, clear and not misleading, and identifiable as such
 - do not contradict or diminish the significance of information contained in the prospectus or the KIID
 - describe risks and rewards in an equally prominent manner
- **Verification of marketing communication by NCAs**
 - prior notification of marketing communications to the home & host NCAs for ex-ante verification of compliance with the general requirement above and with national provisions concerning marketing requirements
 - prior notification of marketing communications not a precondition for marketing and separate from passport notification
 - NCAs free to decide how to handle verification, if at all (ex ante, ex post, systematic verification, risk-based, sample-based...). Requests for amendments to be made by NCAs within 10 working days of notification
- **Transparency of applicable national provisions on marketing communications on NCAs' websites and on ESMA's central database**
- **ESMA to report every 2 years to Commission and co-legislators on national marketing requirements**

⇒ **Welcome harmonisation of principles for marketing communications. Verification role of NCAs (incl. host) clearly acknowledged by EU law. Flexibility to accommodate different supervisory approaches**

3 – NCAs' fees & charges, ESMA central database (R)

□ Common principles for fees and charges levied by NCAs

- must be consistent with the overall cost relating to the performance of the functions of the NCA
- clear legal basis for invoicing of funds under marketing enabling NCA to recover fees and charges

□ Transparency of fees and charges

- up to date information on fees / charges and their calculation methodologies on NCAs' websites and ESMA's website
- 2,5 years after entry into force: public interactive tool to be offered by ESMA enabling indicative calculation of fees/charges

□ ESMA central data base of all AIFs and UCITS marketed across borders in the EU (2,5 years after entry into force)

□ ESMA notification portal for NCAs to upload passport notifications. Review clause to examine whether portal could serve as hub for all transfers of documents between NCAs

⇒ A missed opportunity to establish ESMA as a central hub for the processing of fund passports (notification portal)

4 - Pre-marketing (D & R)

- **New concept of ‘pre-marketing’ to professional investors introduced under AIFMD (+ EuSEF and EuVECA Regulations)**
 - For an AIF which is **not yet established**: provision of information / communication, direct or indirect, on investment strategies or investment ideas to potential EU professional investors to test their interest
 - For an AIF which is **already established**, but not yet notified for marketing in a MS: provision of information / communication on that AIF in that MS
 - In both cases : it shall not amount to an offer or a placement
- **No provision of subscription form or prospectus / offering documents in final form is allowed during pre-marketing**
 - draft documents permitted (red herrings) but they should not contain sufficient information for investors to take investment decision + warnings
- **Informal notification to be provided to Home NCA (which then informs host NCAs) by AIFM with relevant information on pre-marketing (in which MS, period of time, which strategies, which funds)**
- **Anti-circumvention clauses**
 - Acquisition of units following pre-marketing only if fund duly notified for marketing to Home and/or host NCAs pursuant to Art. 31 or 32 AIFMD
 - Reverse solicitation prohibited during 18 months following start of pre-marketing
- **Clarification of status of third-parties who may engage in pre-marketing on behalf of AIFM (regulated entities)**
- **Review clause: 4 years after entry into force, COM to present a report on the extension of ‘pre-marketing’ to UCITS**

⇒ **Welcome addition in the AIFM world. Should have been extended to UCITS. Pre-marketing allowed in France for UCITS (no harmonisation for another 4 years at least). Anti-circumvention clauses welcome**

5 - Denotification of funds (D)

- **Fund de-notification (UCITS or AIF) of arrangements made for marketing as regards fund units in a host Member State subject to preconditions:**
 - Make blanket repurchase offer free of charge for at least 30 days to all investors in host Member State whose identity is known
 - Make public intention to terminate arrangements made for marketing units in host Member State
 - Terminate all contractual arrangements with financial intermediaries or delegates in host Member State
- **Notification letter from the UCITS fund / the AIFM to its Home NCA who then transmits it within 15 days to host NCA and ESMA**
- **Investors who remain invested in the de-notified fund continue to receive periodic reports and KIID**
- **Specific provisions for AIFs**
 - no blanket offer in case of closed-ended AIFs or ELTIF
 - 3-year freezing period: prohibition to engage in pre-marketing in the host MS where AIF was de-notified (same fund or similar investment strategies / ideas)

⇒ **Unclear whether de-notification will be used at all in practice ? Welcome adaptations for AIFs**

6 - Establishment of facilities (R), PRIIPS fix, review clause

- **Obligation for UCITS funds and AIFMs to establish facilities in host Member States in order to**
 - process subscription, repurchase and redemption orders and make payments to unit-holders and provide investors with corresponding information
 - facilitate the handling of complaints from investors
 - make available to investors prospectuses, periodic reports, key investor information
 - act as a contact point for communicating with the host NCA
- **UCITS funds and AIFMs not required to have a physical presence in the host MS, nor to appoint a third party to perform the above tasks**

- **Amendment to PRIIPS Regulation (EU) N° 1286/2014 : 2-year postponement of UCITS exemption (until 31.12.21)**
- **Review clause: Commission report on reverse solicitation (extent of this form of subscription, geographical distribution, including third countries, and impact on the passport regime), 2 years after entry into force**

- **Deadline for national implementation and application date: 2 years after entry into force (spring 2021)**
- **Evaluation of the Directive and the Regulation: 5 years after application**