ICI Global response to the European Commission’s proposals for the cross-border distribution of investment funds

ICI Global [1] lauds the European Commission’s (“Commission”) effort to remove barriers to cross-border fund distribution. [2] We encourage the co-legislators to agree ambitious changes to ease distribution, lower investor costs, and increase investor fund choices and recommend the following amendments to the Commission’s proposals (discussed in more detail in the attached position paper):

- Amend the Commission’s proposal to reflect clearly its intent to prohibit host Member States from requiring a physical presence to be established by either the UCITS management company or an appointed third entity to provide facilities to service investors; [3]
- Enable all management companies to pre-market funds (not just AIFMs), including through the presentation of draft and near-final information documents to investors (e.g. draft offering memorandum);
- Clarify that the provision of information on investment strategies or investment ideas to third-party distributors does not constitute pre-marketing;
- Clarify that after a fund’s establishment, own-initiative subscriptions from investors to whom a fund did not pre-market shall not trigger a marketing notification;
- Introduce provisions to enable a UCITS fund to access the single market passport through a single notification, [4] akin to the registration of EuVECA[5] and EuSEF[6] and the MiFID services passport; [7]
- Extend the scope of ESMA’s mandate to standardise the content and transmission of marketing notifications [8] to include the standardisation of updates to notifications that have been previously submitted;
- Expand the proposed ESMA central database of funds and management companies [9] to act as a single central “hub” for notifications and fund documentation (e.g., KIIDs);
- Remove the proposed conditions for management companies to discontinue marketing in a host Member State because these conditions do not enhance investor protections afforded by existing obligations and may create unfairness between exiting and remaining fund investors. [10]

As noted by the Regulatory Scrutiny Board, [11] we recommend that the Commission continue to examine factors that affect cross-border distribution not covered by the initiative, including other impediments and barriers (e.g. tax and administrative arrangements) to the offering of funds and detract from the attractiveness of cross-border investment.

[1] ICI Global carries out the international work of the Investment Company Institute, the leading association representing regulated funds globally. ICI’s membership includes regulated funds publicly offered to investors in jurisdictions worldwide, with total assets of US$29.2 trillion. ICI seeks to encourage adherence to high ethical standards, promote public understanding, and otherwise advance the interests of regulated investment funds, their managers, and investors. ICI Global has offices in London, Hong Kong, and Washington, DC.


[5] New Article 14a(7) to the EuVECA Regulation

[6] New Article 15a(7) to the EuSEF Regulation

[7] Article 34, MIFID II and Article 92, MIFID in respect of the provision of certain investment services by AIFMs.


[10] Proposed new Article 83a to the UCITS Directive contained in Article 1(7), proposed Directive

ICI Global Position Paper on the European Commission’s proposals for the cross-border distribution of investment funds

ICI Global\(^1\) lauds the European Commission’s (“Commission”) effort to remove barriers to cross-border fund distribution through the adoption\(^2\) of a proposal for a regulation\(^3\) and a directive.\(^4\) We strongly encourage the co-legislators to build on the Commission’s proposals by introducing the ambitious changes outlined below. We believe that these changes will ease distribution, lower investor costs, increase investor fund choices and contribute to the delivery of the Commission’s Capital Market Union objectives, including supporting the financing of the EU’s real economy to create jobs and growth.

**Investor facilities**

We fully support the Commission’s proposed ban on Member State requirements for a management company to establish a physical presence in each host Member State in providing facilities to service investors\(^5\) and agree that the choice of facilities, including the use of digital technology, should be left to management companies. The use of digital technology enables investor facilities to be provided in a more efficient and effective manner, including cross-border. Requiring a physical presence in each host Member State is therefore outdated and costly. We recommend that the co-legislators clarify that the proposed ban on Member States requirements for a physical presence applies not only to management companies but also to third entities, appointed by the management company. The following changes should be made to the Commission’s proposed Directive to clarify the position:

Article 1(5) – the proposed revision to Article 92(2) of the UCITS Directive should be amended as follows: “Member States shall not require the UCITS management company, or an appointed third entity, to have a physical presence for the purpose of paragraph 1.”

Article 2(7) – the proposed addition of Article 43a(2) to the AIFM Directive should be amended as follows: “Member States shall not require the AIFM, or an appointed third entity, to have a physical presence for the purpose of paragraph 1.”

**Pre-marketing**

We fully support the Commission’s efforts to develop a pan-European pre-marketing regime. We recommend the following changes to enable fund managers to best test new investment ideas and investment strategies to meet the demands and needs of investors:

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\(^2\) https://ec.europa.eu/info/publications/180312-proposal-investment-funds_en

\(^3\) http://ec.europa.eu/info/law/better-regulation/initiatives/com-2018-110_en


\(^5\) Local facilities to perform the tasks specified in the revised Article 92 to the UCITS Directive (2009/65/EC).
• **Extend pre-marketing to all management companies (not just AIFM) to include UCITS management companies and super management companies (i.e. managing UCITS and AIF)** to allow fund managers to seek feedback on investor preference. We see no policy rationale for the Commission’s proposed approach of limiting the pre-marketing regime to AIFMs and treating other management companies differently than AIFMs (e.g. UCITS only and super management companies). This approach may create distortion in the market and is not justified on investor protection grounds. We believe professional investors in UCITS should be treated the same as those investing in AIF, and there are no investor protection reasons to treat them differently. The ability to pre-market UCITS can facilitate professional investors seeding investment funds after establishment to enable the management company to build scale and establish performance track record;

• **Enable pre-marketing of funds before they are established** so fund managers can: (i) undertake the legal work associated with a new fund (e.g. incorporating the investment company or in the case of an established umbrella facilitating the creation of a new sub-fund); and (ii) refine the definitive features of the new (sub-)fund (e.g. investment strategy), before they establish the fund (e.g. seeking regulatory authorisation or registration). Not enabling fund managers to pre-market a fund before its establishment, while at the same time refining the specific features of the proposed fund, may delay subsequent subscription by investors;

• **Permit the presentation of draft and near final marketing communications and obligatory investor disclosures** to enable fund managers to fine tune potential investment ideas and investment strategies, including testing investor understanding and clarity in the description of fund objectives. We believe that the Commission’s proposed restriction on the presentation of draft information to investors may be counterproductive and not achieve the Commission’s stated objective that such information is fair, clear and not misleading;

• **Clarify that after a fund’s establishment, own-initiative subscriptions from investors to whom the fund did not pre-market shall not trigger a marketing notification.** The Commission’s proposal treats any subscriptions from investors regardless of whether they participated in the fund’s pre-marketing as having resulted from marketing activity. Subscriptions from other investors to whom the fund did not pre-market should be treated in the same manner as for a fund that has not undertaken any pre-marketing prior to its launch: subscriptions from investors at their own-initiative would not trigger a marketing notification;

• **Clarify that the provision of information on investment strategies or investment ideas to third-party distributors does not constitute pre-marketing** as this supports the product governance process required under MIFID II, including the identification of the target market for a new product.

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6 This extension of scope could be effected through changes to Article 2 of the proposed Directive, including amendments to the definition of pre-marketing and consequential changes to the UCITS Directive.

7 This change could be effected by clarifying the term “established AIF” in the definition of pre-marketing and related provisions.

8 This change could be effected by clarifying the proposed article 30a(d) amendment to AIFMD.
Cross-border marketing notifications

Building on the Commission’s proposals to standardise the content and transmission of marketing passport notifications proposals, we recommend two further steps to reduce complexity and delays in cross-border marketing.

(i) Single registration marketing notification

We recommend enabling investment funds to obtain a marketing passport that is valid in the entire territory of the Union through a single registration, akin to the approach adopted for EuVECA\(^9\) and EuSEF\(^10\) and the MiFID services passport.\(^11\) The current multilateral home Member State to host Member State(s) notification procedure\(^12\) add layers of complexity and can cause delays to the cross-border marketing of a UCITS fund.

(ii) Standardisation of notification updates and the creation of a single central notification “hub”

We recommend extending the scope of ESMA’s proposed mandate to standardise the content and transmission of marketing notifications\(^13\) to include the standardisation of updates to previously submitted notifications. Host Member State regulators often impose additional procedures for notification updates (e.g., the payment of a notification update fee, the requirement to upload the updated KIID onto a regulator’s proprietary system). These procedures add layers of complexity and can cause delays to the cross-border marketing of a UCITS fund.

We also recommend extending the proposed ESMA central database of funds and management companies\(^14\) to act also as a single central “hub” for notifications and fund documentation (e.g., KIIDs).

Harmonising the electronic transmission and filing of notifications, including for updates to documentation, will reduce greatly complexity and improve efficiency for cross-border UCITS funds.

Discontinuation of marketing

The Commission’s proposal would impose certain conditions before a management company may discontinue marketing of a fund in a host Member State (e.g. where the direct or indirect offering or

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\(^11\) Article 34, MiFID II and Article 92, MiFID in respect of the provision of certain investment services by AIFMs.

\(^12\) Under the current cross-border marketing notification procedure, a UCITS or AIF must submit notification letter (and supplementary materials such as the KIID) to the competent authorities of its home Member State, whom in turn transmits the notification to the competent authorities of the Member State(s) in which the UCITS proposes to market its units.

\(^13\) Article 11, proposed Regulation.

\(^14\) Article 10, proposed Regulation.
placement of units or shares of a fund by, or on behalf of, a management company ceases). We are concerned with the imposition of those conditions, including the risk of creating unfairness issues between existing or remaining investors, and are not clear as to the purpose of such requirements. A fund may discontinue marketing in a particular host Member State, but the fund must continue to provide facilities to service investors and to provide obligatory disclosures to existing investors. These requirements should provide adequate protection for fund investors. The Commission has not articulated the potential concerns for existing investors when a fund no longer conducts marketing in a particular host Member State and how the proposed conditions would address those concerns.

Other aspects of the Commission’s proposals

As noted by the Regulatory Scrutiny Board, we recommend that the Commission continues to examine factors that affect cross-border distribution not covered by the initiative, including other impediments and barriers (e.g., tax and administrative arrangements), to the offering of funds and detracts from the attractiveness of cross-border investment.

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15 Article 4(1)(w) of the AIFMD defines marketing as “a direct or indirect offering or placement at the initiative of the AIFM or on behalf of the AIFM of units or shares of an AIF it manages to or with investors domiciled or with a registered office in the Union”.

16 We are concerned that the Commission’s proposed Article 93a(1)(b) amendment to the UCITS Directive to require an offer of redemption that is free of any charges or deductions, will not enable a fund to impose charges (e.g. dilution adjustments) to meet disinvestment costs, as is permitted in the case of a UCITS merger (Article 45(1), UCITS Directive).