

**MEMO# 32546**

June 23, 2020

# **ESMA Consultation on the Publication of Fund Marketing Requirements and Regulatory Levies: Draft ICI Global Response**

[32546]

June 22, 2020 TO: Global Operations Advisory Committee

ICI Global EU Capital Markets Union Task Force

ICI Global Regulated Funds Committee RE: ESMA Consultation on the Publication of Fund Marketing Requirements and Regulatory Levies: Draft ICI Global Response

On 31 March 2020, the European Securities and Markets Authority (ESMA) published a consultation paper (CP)[\[1\]](#) on draft implementing technical standards (ITS) under the Regulation on the cross-border distribution of funds ("CBDF Regulation").[\[2\]](#) ESMA is seeking comments in response to the CP by 30 June 2020. Attached is ICI Global's draft response on which we are seeking member comments by close of business on Friday 26 June 2020.

## **Background**

The CBDF Regulation is part of a package of measures[\[3\]](#) intended to remove existing barriers to the cross-border marketing of funds across the EU's internal market. One of the CBDF Regulation's objectives is to increase the transparency of: (i) the national marketing rules that apply to cross-border funds; and (ii) the fees and charges that are levied by national competent authorities (NCAs) in connection with cross-border marketing (e.g., processing marketing notifications and periodic updates to documentation etc.)

Under the CBDF Regulation, national competent authorities (NCAs) are required to publish on their website:

- information on national laws, regulations and administrative provisions governing the marketing of UCITS and AIFs;[\[4\]](#) and
- the fee or charges that are levied by NCAs[\[5\]](#) in connection with their duties in relation to the cross-border activities[\[6\]](#) of AIFMs[\[7\]](#) and UCITS ManCos.[\[8\]](#)

The CBDF Regulation also mandates ESMA to publish on its website a central database of funds that are marketed cross-border in the EU.[\[9\]](#) The database will be populated with data supplied by NCAs on a quarterly basis via a new notification portal.[\[10\]](#)

In the CP, ESMA proposes draft ITS on the standard forms, templates and procedures for notification and publication of the website publications outlined above.[\[11\]](#)

## **ICI Global's Draft Response**

In our draft response, we express our full support for efforts to remove impediments to the cross-border distribution of funds, including ESMA's proposals.

We fully support enhancing the transparency of Member States' marketing requirements for funds and the regulatory fees and charges levied by NCAs. We report that ICI Global members often encounter challenges when accessing marketing requirements and regulatory fees and charges or find that the publication of information is incomplete. We recommend that ESMA develops an approach to the publication of marketing requirements and regulatory fees and charges which requires NCAs to publish information in the most harmonised manner to support ease of access and comparability across Member States.

We also fully support the development of a central database of UCITS that are marketed on a cross-border basis. We consider the development of such a database to be an important first step which has the potential to:

- provide fund investors with comprehensive and easily accessible information on funds to support investment decisions; and
- reduce the administrative costs and complexity for funds when filing mandatory investor disclosures, including for cross-border marketing notifications.

The sections below outline ESMA's proposals in the CP and summarise in more detail our draft response.

## **Website Publication of Marketing Requirements**

The CBDF Regulation requires NCAs to "publish and maintain, on their websites, up-to-date and complete information on the applicable national laws, regulations and administrative provisions governing marketing requirements for AIFs and UCITS, and the summaries thereof in, as a minimum, a language customary in the sphere of international finance."

ESMA has proposed the scope and format of information on fund marketing requirements which NCAs will be required to publish on their website. ESMA considers that the publication of this information will: (i) help fund managers in their decision-making to engage in marketing activities in host Member State; (ii) enhance investor protection by making information on marketing requirements more easily accessible.

### **Scope of the information to be published by NCAs on their websites**

ESMA has proposed that the information published by NCAs should:

- encompass complete and precise information relating to the specific requirements for the marketing of investment funds, which are applicable within each Member State, in relation to both domestic and cross-border marketing; and
- make reference, along with the requirements specifically designed for the marketing of investment funds, to other bodies of domestic law – which are not set out specifically for the marketing of UCITS and AIFs – that could apply in the event of marketing to retail investors (e.g., consumer protection laws).

ESMA asks whether respondents agree that the information to be published should not only concern requirements applicable specifically to the marketing of investment funds but also

include a general statement of other bodies of law in the jurisdiction including rules on the protection of consumers in general. Furthermore, ESMA asks whether the general statement could take the form of a general disclaimer which refers to a non-exhaustive list of relevant bodies of law (Question 1, CP).

In our draft response, we support ESMA's proposed approach and recommend that NCAs should publish details of all the local requirements that are applicable to the marketing of investment funds, including domestic and cross-border funds. We also recommend that this publication should include details of general consumer protection legislation, rules and guidance and, as applicable, other bodies of law and regulation of relevance to funds including tax reporting requirements. We set out a non-exhaustive list of items that we consider should be included in the publication of marketing requirements.

### **Format of the publication of complete and up-to-date information on marketing requirements on NCAs' websites**

ESMA has proposed that the format for the publication of applicable national laws, regulations and administrative provisions governing the marketing of UCITS and AIFs by NCAs should be flexible. ESMA considers that NCAs should focus on highlighting the requirements applicable to each type of funds rather than focusing on the form of the publication (e.g. text or table). As such, ESMA proposes that the requirements in the ITS are general, requiring NCAs to clearly identify the requirements applicable to the marketing UCITS and those applicable to the marketing of each type of AIFs existing under national law, on both a domestic and cross-border basis.

ESMA asks whether respondents agree with its proposed approach to provide flexibility in the format of publication of applicable national laws, regulations and administrative provisions governing fund marketing by NCAs and if not to provide alternative suggestions (Question 2, CP).

In our draft response, we fully support the development of a common format for the publication of marketing requirements and agree with ESMA that this will support easier access to information and comparability across NCAs. We support providing flexibility in the format of publication by NCAs but recommend that ESMA develops an approach which enables NCAs to publish information in the most harmonised manner. For instance, we recommend that ESMA develops "categories" of marketing requirements under which NCAs could publish their national requirements and list potential categories that could be included.

### **Format of the publication of the summaries of marketing requirements**

The CBDF Regulation requires NCAs to publish on their website a summary of the marketing requirements that are applicable to funds.<sup>[12]</sup> ESMA considers that this summary should provide a broad overview of applicable requirements in a clear and simple manner. Furthermore, the summary should constitute high-level guidance on the applicable requirements, giving sufficient information to understand the main steps to be taken when marketing funds in a particular jurisdiction including references to where more detailed information is available (e.g. hyperlinks to the full version of any relevant provisions etc.) ESMA notes that the published summary should not be designed as an exhaustive list of marketing requirements, nor should it constitute a legally binding document for NCAs.

ESMA asks respondents to the CP whether they agree with the approach taken regarding

the main characteristics of the summary of marketing requirements that NCAs will publish on their website. ESMA also asks respondents which elements they favour including in the text or a table (Question 3, CP).

In our draft response, we support ESMA's proposed approach. We support consistency in the format of publication and suggest that a table may be a suitable format for publication, including providing the opportunity to create an easy to access means of downloading the information in a comparable way to support cross Member State comparison and analysis (e.g. as a CSV file or in spreadsheet format).

## **Website Publication of Regulatory Fees and Charges**

The CBDF Regulation requires NCAs to list on their website information on the fees or charges they levy for carrying out their duties in relation to the cross-border activities of certain investment fund managers, including AIFMs and UCITS ManCos. NCAs are required to either list the fees or charges or, where applicable, the calculation methodologies for the fees and charges. ESMA considers that the purpose of the draft ITS it is empowered to develop under the CBDF Regulation should not be to determine the type or amount of the fees or charges that are levied but instead to ensure transparency of these fees and charges.

ESMA proposes that NCAs should publish on their website all regulatory fees and charges they levy in relation to any cross-border activities within their jurisdiction, whether inwards or outwards. The website publication should make clear that there are no other fees or charges levied other than those listed on the website. ESMA's considers that the requirement under the CBDF Regulation for NCAs to list of fees or charges or, where applicable, the calculation methodologies for fees and charges provides a discretionary option for NCAs to either list the regulatory fees and charges or the calculation methodologies thereof where such methodologies exist.

ESMA asks respondents to the CP whether they agree with the approach taken with respect to the scope of regulatory fees and charges to be published by NCAs on their websites (Question 4).

In our draft response, we support ESMA's proposed approach and recommend that NCAs include explanatory text as necessary to enable the published information to be easily interpreted and understood.

The CBDF Regulation requires ESMA to develop draft ITS to determine the standard forms for the publication of information on regulatory fees and charges on NCAs' websites. ESMA proposes an easy to read and harmonised table format for publication, accompanied by explanatory text and containing at least the following information:

- a detailed breakdown of the different type of applicable regulatory fees and charges, including the amount to be paid as either a fixed fee or a percentage (and the basis for calculation, as applicable);
- the type of activity to which the fee relates (e.g. marketing by a domestic manager of a fund established in another Member State to domestic investors, etc.);
- the legal basis for levying the fee;
- the periodicity of the fee, as applicable; and
- the person or entity who is liable for paying the fee.

ESMA considers that the publication of regulatory fees and charges by NCAs should give all

relevant details of the fees and charges levied for cross-border activities of fund managers in a clear and comprehensive manner. Furthermore, ESMA notes that as the structure of the fees and charges levied by NCAs may differ from one Member State to another, NCAs should be able to add some explanatory text to give some detailed information on the fees and charges the structure of which cannot be summarised in a table.

ESMA asks respondents to the CP:

- if publication of information on fees and charges by NCA should be in the form of a table or in another format (Question 5);
- whether NCAs should have the option to supplement the tables with full text on the fees and fee calculation (Question 6);
- if the content of the published table proposed by ESMA is agreeable or whether other information should be included (Question 7).

In our draft response, we support consistency in the format of publication by NCAs. We recommend that when NCAs exercise the option to publish the calculation methodology for fees and charges, that this is supplemented by example calculations which list sample fees and charges for different categories of regulatory transaction (e.g. notification filings, update filing etc.). We support ESMA's proposed content for the table of regulatory fees and charges, but to further support easy of interpretation and comparison across NCAs, we recommend that ESMA develops categories of fees under which NCAs would publish information. We set out a non-exhaustive list of possible categories of fees and charges.

### **Central Database Listing Funds Marketed on a Cross-Border Basis**

The CBDF Regulation requires ESMA to publish on its website a central database of regulated funds that are marketed cross-border, including information on the management company of the fund (e.g., AIFM, UCITS ManCo etc.) and the Member States in which the fund is marketed. ESMA considers that information communicated as part of cross-border marketing notifications,[\[13\]](#) including changes to that information, will need to be communicated to ESMA by NCAs to populate the central database and ensure it remains up-to-date.

ESMA considers that as the forms, templates and procedures for the communication of relevant information for the database and technical arrangements for the functioning of the notification portal relate to bilateral relationships between NCAs and ESMA, it is "highly disproportionate" to seek stakeholders' views on the relevant ITS. However, ESMA asks respondents about the use they would make of the information contained in a central database listing cross-border marketed funds and suggestions as to the format of the database (Question 8).

In our draft response, we set out that a well-constructed EU-wide database of cross-border marketed funds is an important first step which has the long-term potential to:

- provide fund investors with comprehensive and easily accessible information on funds to support investment decisions; and
- develop a central information "hub" to reduce the administrative costs and complexity for funds when filing mandatory investor disclosures, including for cross-border marketing notifications.

We also recommend guiding principles for the development and operation of the database concerning access, scope and coverage, functionality and technology and security.

## Next Steps

ESMA intends to use the feedback it receives in response to the CP to publish a final report by 2 February 2021. The CBDF Regulation requires ESMA to publish on its website the database of cross-border marketed funds by 2 February 2022.

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## [Attachment](#)

### endnotes

[1] [https://www.esma.europa.eu/sites/default/files/library/esma34-39-966\\_-\\_cp\\_on\\_its\\_on\\_cross-border\\_distribution\\_of\\_funds.pdf](https://www.esma.europa.eu/sites/default/files/library/esma34-39-966_-_cp_on_its_on_cross-border_distribution_of_funds.pdf)

[2] Regulation (EU) 2019/1156 of the European Parliament and of the Council of 20 June 2019 on facilitating cross-border distribution of collective investment undertakings and amending Regulations (EU) No 345/2013, (EU) No 346/2013 and (EU) No 1286/2014, available from <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32019R1156>

[3] The CBDF Regulation is complemented by Directive 2019/1160 on cross-border distribution of collective investment undertakings, available from <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019L1160&from=EN>

[4] Article 5, CBDF Regulation

[5] Article 10, CBDF Regulation

[6] Article 9, CBDF Regulation

[7] Alternative Investment Fund Managers

[8] UCITS Management Companies

[9] Article 12, CBDF Regulation

[10] Article 13, CBDF Regulation

[11] Article 5(3), Article 10(3) and Article 13(3) of the CBDF Regulation empower ESMA to develop draft ITS

[12] Article 5(1), CBDF Regulation

[13] i.e. under Article 93 and 93a of the UCITS Directive and Article 31-33 of the AIFM Directive

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