

**MEMO# 31418**

October 2, 2018

# **EU Cross-Border Distribution Proposals - RESCHEDULED Member Call on Monday 8 October**

[31418]

October 2, 2018 TO: ICI Global EU Capital Markets Union Task Force  
ICI Global Regulated Funds Committee  
International Operations Advisory Committee RE: EU Cross-Border Distribution Proposals -  
RESCHEDULED Member Call on Monday 8 October

ICI Global has rescheduled the member call to discuss the EU's Cross-Border Distribution proposals for Monday 8 October at 1pm BST/8am ET.<sup>[1]</sup> A comparison of the positions of the European co-legislators on the proposals are summarised in this memo. Dial in details for the member call are below:

UK: 0330 336 0036  
US: 1 917 793 0005  
PIN: 066875

Other telephone

numbers: <https://static.powwownow.co.uk/media/pdf/Powwownow-Dial-in-Numbers.pdf>

If you wish to join the member call, please advise Lesley Dunn on +44 207 961 0830 or at [lesley.dunn@iciglobal.org](mailto:lesley.dunn@iciglobal.org).

## **State of Play**

As previously advised,<sup>[2]</sup> on 12 March 2018 the European Commission ("the Commission") published a proposed Regulation<sup>[3]</sup> and a proposed Directive<sup>[4]</sup> ("the proposed legislation") to facilitate the cross-border distribution of investment funds in the EU.<sup>[5]</sup> ICI Global has lauded the Commission's proposals but recommended changes<sup>[6]</sup> to the proposed legislation.

On 15 June, the Council of the EU ("the Council") reached a general approach<sup>[7]</sup> on the proposed Regulation<sup>[8]</sup> and the proposed Directive.<sup>[9]</sup> On 18 September, the Rapporteur for the proposed legislation<sup>[10]</sup> in the Economic and Monetary Affairs Committee (ECON) of the European Parliament ("the Parliament"), MEP Wolf Klinz (ALDE),<sup>[11]</sup> published draft reports on the proposed Regulation<sup>[12]</sup> and the proposed Directive<sup>[13]</sup> ("the Rapporteur's draft reports").

## Comparison of co-legislator positions on key issues

### ***Host Member State investor facilities***

UCITS are required to ensure investor facilities are available in each Member State where their units are marketed.<sup>[14]</sup> Some Member States have required physical facilities to be established by UCITS, including through the appointment of a third party (e.g. a paying agent). Acknowledging the use of digital technology and cross-border payment systems, and in line with ICI Global's recommendations, the Commission has proposed a ban on host Member States requiring a UCITS management company to *establish* a physical presence to provide investor facilities.<sup>[15]</sup> The Commission envisages that the UCITS management company itself and/or an appointed "*third entity*" could provide such facilities. In the case that a third entity is appointed, the Commission has proposed that such an entity could be "*subject to regulation governing the tasks to be performed*".<sup>[16]</sup> It is unclear whether the regulation governing the tasks performed by the third entity could result in that entity being required to have physical presence in the host Member State.

The general approach agreed by the Council proposes that investor facilities could be provided "*by the UCITS management company itself or a third party subject to regulation and supervision governing the tasks to be performed, or both, including by the use of electronic means*".

The Rapporteur is proposing that UCITS make available investor facilities in host Member States,<sup>[17]</sup> but that a physical presence should not be required, nor should a UCITS be required to appoint a third party for such facilities.<sup>[18]</sup> The Rapporteur envisages that such facilities should act as a contact point for the host Member State regulator.<sup>[19]</sup> Subject to further member comment, we plan to support the amendments proposed by the Rapporteur.

### ***Scope of pre-marketing by management companies***

The Commission has proposed a pre-marketing regime with the objective of enabling a fund manager to test investment ideas or strategies with professional investors before a fund's launch. The proposed scope of the regime covers AIFMs, including managers of EuVECA and EuSEF,<sup>[20]</sup> but not UCITS management companies. The general approach agreed by the Council<sup>[21]</sup> and the draft proposals of the Rapporteur<sup>[22]</sup> support the scope of the Commission's proposals.

We believe that limiting pre-marketing regime to AIFMs and treating other management companies differently 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. Subject to further member comment, we plan to recommend that pre-marketing is extended to UCITS management companies by amending the first part of the pre-marketing definition.

### ***Treatment of information provided to third-party distributors***

The Commission has identified that pre-marketing is associated with the provision of information on investment strategies or investment ideas to professional investors. MIFID II

requires fund managers to identify and define a target market for a fund and monitor the distribution of the fund over time. MIFID II envisages that this will require communication between fund managers, as product manufacturers, and distributors. The presentation of information to distributors to support the identification of a target market does not constitute pre-marketing as information is not being provided to investors. It is beneficial to clarify this to ensure uniform application across the internal market and to enable fund managers to discuss the target market for a fund in all potential markets into which it may be distributed. Neither the Commission proposals, the Council's general approach nor the Rapporteur's draft proposals address the provision of information to distributors. Subject to member comment, we plan to recommend the addition of a recital to the Commission's proposal to clarify that discussions with distributors by fund managers do not constitute pre-marketing as information is not being provided to investors.

### ***Scope of pre-marketing of funds***

The Commission has proposed a limitation on pre-marketing to only those funds that have not been established.[\[23\]](#) The Council's general approach extends the scope of the Commission's proposal by envisaging that an established fund could be pre-marketed to an investor if the fund has not submitted a cross-border marketing for that investor's Member State and the pre-marketing does not amount to an offer or placement.[\[24\]](#) The Rapporteur is proposing to permit pre-marketing of funds which are not yet established in the Member State where the potential investors are domiciled or have their registered office.[\[25\]](#) Subject to further member comment, we plan to support the amendments proposed by the Rapporteur.

### ***Conditions for pre-marketing***

The Commission has proposed strict conditions under which pre-marketing can be carried out. In particular, the Commission is not proposing to allow the presentation of draft or final form information to investors, such as a prospectus, constitutional documents, offering documents, subscription forms or similar documents, as part of pre-marketing.[\[26\]](#)

The Council's general approach is less strict than the Commission's proposals and allows the presentation of a draft prospectus or offering documents, subject to such documents: (i) not containing all relevant information to allow investors to take an investment decision; and (ii) clearly stating that the document does not constitute an offer or an invitation to subscribe to units or shares of an AIF and the information presented in those documents should not be relied upon because it is incomplete and may be subject to change. The Rapporteur is not proposing any restrictions on the presentation of documents to investors during pre-marketing,[\[27\]](#) but instead proposes to require that information on pre-marketing is made available to NCAs.[\[28\]](#) Subject to further member comment, we plan to support the amendments proposed by the Rapporteur.

### ***Treatment of own-initiative subscriptions following pre-marketing***

The AIFMD's marketing definition refers to "offering or placement at the initiative of the AIFM or on behalf of the AIFM".[\[29\]](#) The Commission is proposing that any subscriptions into a fund that has been pre-marketed are to be treated as having resulted from marketing activity, even if the subscription has been made at the investor's own initiative. Furthermore, the Commission's proposed approach would apply to all fund investors regardless of whether they had been engaged in pre-marketing. Deeming all subscriptions as having resulted from marketing activity would trigger a marketing notification for the

fund.

The Council's general approach and the Rapporteur's draft report propose an 18 month period from the point of pre-marketing during which any subscription by professional investors into a fund shall be considered the result of marketing, regardless of whether the subscription was at the investor's initiative or otherwise.

We recommend that 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. Subject to further member comment, we plan to recommend that an amendment is made to the Commission's proposal to achieve this outcome.

### ***Cross-border marketing notification process***

The current multilateral home to host Member State notification procedure add layers of complexity and can cause delays to cross-border marketing. The Commission has proposed the standardisation of the content and form of cross border marketing notifications.[\[30\]](#) The Council's general approach[\[31\]](#) and the Rapporteur's draft proposals,[\[32\]](#) limit the scope of standardisation proposed by the Commission to only those notifications necessary for ESMA to maintain a central database of cross-border marketed funds. We recommend that the Parliament agree an ambitious proposal to enable UCITS to obtain a pan-EU marketing passport through a single registration, akin to the approach adopted for EuVECA and EuSEF. Subject to member comment, we plan to recommend an amendment to the Commission's proposal to enable UCITS to obtain the pan-EU marketing passport through a single registration

### ***Strengthening ESMA's co-ordination role***

The Commission has proposed that ESMA creates a central database of all AIFMs and UCITS management companies along with the funds they manage and the Member States into which those funds are marketed.[\[33\]](#) The Council's general approach[\[34\]](#) and the Rapporteur's draft proposals[\[35\]](#) limit the scope of the proposed ESMA database to only those funds that are marketed cross-border. Subject to member comment, we will reiterate our support for the Commission's proposal for ESMA to create a comprehensive database, but also extend this to include fund documentation such as KIIDs.

### **Next Steps**

MEP Klinz is due to present his draft report to the ECON Committee at its meeting on 8 October. ECON Committee MEPs are likely to have until 22 October to submit their amendments to the draft report, with a vote on a final report in the ECON Committee scheduled for 20 November. If voted through, the final report will represent the negotiating position of the Parliament in trilogue negotiations with the Council and the Commission.

Giles Swan  
Director of Global Funds Policy, ICI Global

## endnotes

[1] The previous call scheduled for 24 September was postponed as MEP Klinz's draft report was yet to be circulated, as advised in Memorandum No. 31394, available from <https://www.iciglobal.org/iciglobal/pubs/memos/ci.memo31394.global>

[2] Memorandum No. 31145, RE: EU Proposals to Facilitate the Cross-Border Distribution of Investment Funds, dated 27 March 2018, available from <https://www.iciglobal.org/iciglobal/pubs/memos/ci.memo31145.global>

[3] Proposal for a Regulation on facilitating cross-border distribution of collective investment funds and amending Regulations (EU) No 345/2013 and (EU) No 346/2013 ("Commission Proposed Regulation"), available from <https://ec.europa.eu/transparency/regdoc/rep/1/2018/EN/COM-2018-110-F1-EN-MAIN-PART-1.PDF>

[4] Proposal for a Directive amending Directive 2009/65/EC of the European Parliament and of the Council and Directive 2011/61/EU of the European Parliament and of the Council with regard to cross-border distribution of collective investment funds, ("Commission Proposed Directive"), available from <https://ec.europa.eu/transparency/regdoc/rep/1/2018/EN/COM-2018-92-F1-EN-MAIN-PART-1.PDF>

[5] [https://ec.europa.eu/info/publications/180312-proposal-investment-funds\\_en](https://ec.europa.eu/info/publications/180312-proposal-investment-funds_en)

[6] Memorandum No. 31204, RE: EU Cross-Border Distribution Proposals – ICI Global Feedback, dated 10 May 2018, available from <https://www.iciglobal.org/iciglobal/pubs/memos/ci.memo31204.global#>

[7] Proposal for a directive with regard to cross-border distribution of collective investment undertakings and a proposal for a regulation facilitating cross-border distribution of collective investment undertakings and amending Regulations (EU) No 345/2013 and (EU) No 346/2013, mandate for negotiations with the European Parliament ("Council's General Approach"), available from <http://data.consilium.europa.eu/doc/document/ST-9910-2018-INIT/en/pdf>

[8] Proposal for a regulation on facilitating cross-border distribution of collective investment undertakings and amending Regulations (EU) No 345/2013 and (EU) No 346/2013, Mandate for negotiations with the European Parliament, available from <http://data.consilium.europa.eu/doc/document/ST-9910-2018-ADD-2/en/pdf>

[9] Proposal for a directive with regard to cross-border distribution of collective investment undertakings, mandate for negotiations with the European Parliament, compromise proposal ("Council's General Approach on the Proposed Directive"), available from [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CONSIL:ST\\_9910\\_2018\\_ADD\\_1&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CONSIL:ST_9910_2018_ADD_1&from=EN)

[10] [http://www.europarl.europa.eu/oeil-mobile/fiche-procedure/2018/0041\(COD\)](http://www.europarl.europa.eu/oeil-mobile/fiche-procedure/2018/0041(COD))

[11] [http://www.europarl.europa.eu/meps/en/28244/wolf\\_klinz\\_home.html](http://www.europarl.europa.eu/meps/en/28244/wolf_klinz_home.html)

[12] Draft Report on the proposals for a regulation on facilitating cross-border distribution of collective investment funds ("Rapporteur's Draft Report on the Proposed Regulation"),

available from

<http://www.europarl.europa.eu/sides/getDoc.do?type=COMPARL&reference=PE-627.812&format=PDF&language=EN&secondRef=01>

[13] Draft Report on the proposal for a directive with regard to cross-border distribution of collective investment funds (“Rapporteur’s Draft Report on the Proposed Directive”), available from

<http://www.europarl.europa.eu/sides/getDoc.do?type=COMPARL&reference=PE-627.813&format=PDF&language=EN&secondRef=01>

[14] Article 92, UCITS Directive

[15] Article 92(2), Commission Proposed Directive

[16] Article 92(3)(b), Commission Proposed Directive

[17] Amendment 17, Rapporteur’s Draft Report on the Proposed Directive

[18] Amendment 24, Rapporteur’s Draft Report on the Proposed Directive

[19] Amendment 23, Rapporteur’s Draft Report on the Proposed Directive

[20] Proposed Article 4(1)(aea) amendment to AIFMD, Commission Proposed Directive

[21] Proposed Article 4(1)(aea) amendment to AIFMD, Council’s General Approach on the Proposed Directive

[22] Amendment 23, Rapporteur’s Draft Report on the Proposed Directive

[23] Proposed Article 4(1)(aea) amendment to AIFMD, Commission Proposed Directive

[24] Proposed Article 4(1)(aea) amendment AIFMD refers to cross-border marketing notifications in the “Member state where the investors are domiciled or have their registered office”, Council’s General Approach on the Proposed Directive

[25] Amendment 9, Rapporteur’s Draft Report on the Proposed Directive

[26] Article 30a, Commission Proposed Directive

[27] Amendments 44-48, Rapporteur’s Draft Report on the Proposed Directive

[28] Amendment 50, Rapporteur’s Draft Report on the Proposed Directive

[29] Article 4(1)(x), AIFMD

[30] Article 11, Commission Proposed Regulation

[31] Article 11, Council’s General Approach on the Proposed Regulation

[32] Amendment 51 and 54, Rapporteur’s Draft Report on the Proposed Regulation

[33] Article 10, Commission Proposed Regulation

[34] Article 10, Council’s General Approach on the Proposed Regulation

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