

MEMO# 31829

June 28, 2019

Final EU Legislation on the Cross-Border Distribution of Investment Funds

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June 28, 2019 TO: ICI Global EU Capital Markets Union Task Force
ICI Global Regulated Funds Committee

International Operations Advisory Committee RE: Final EU Legislation on the Cross-Border Distribution of Investment Funds

On 14 June 2019, [\[1\]](#) Finance Ministers in the Council of the EU (“the Council”) adopted the final text of a package of reforms designed to ease the cross-border distribution of investment funds. This memo provides background to the package and the key elements of relevance for cross-border regulated funds and their managers.

Background

In March 2018, the European Commission (“Commission”) proposed [\[2\]](#) a Regulation [\[3\]](#) and a Directive [\[4\]](#) to facilitate the cross-border distribution of investment funds in the EU. ICI Global strongly supported the Commission’s initiative but encouraged policymakers to go further. [\[5\]](#) We proposed recommendations to encourage the co-legislators to agree ambitious changes to ease distribution, lower investor costs, and increase investor fund choices. [\[6\]](#) On 5 February 2019, [\[7\]](#) political agreement was reached between the European Parliament and the Council on the Regulation [\[8\]](#) (“CBDF Regulation”) and the Directive [\[9\]](#) (“CBDF Directive”).

Key elements of the final package

The key elements of the agreed measures in the CBDF Regulation and CBDF Directive that are of relevance to regulated funds and their managers are outlined below.

Local Investor Facilities

A UCITS has hitherto been required to ensure that facilities are available in each host Member State to enable investors to redeem their holdings (e.g. through paying agents) and obtain certain information on the UCITS. [\[10\]](#) In many cases, host Member State NCAs have required physical facilities to be established. To reflect changing investor preferences for virtual interaction (e.g. electronically or by telephone), [\[11\]](#) the CBDF Directive prohibits Member States from requiring UCITS to have a physical presence in host Member States to provide facilities to investors. [\[12\]](#) Instead, the CBDF Directive enables related “tasks” to be provided through various means, including electronically [\[13\]](#) and/or through the appointment of a third party (which may be subject to regulation and supervision). [\[14\]](#) Similar provisions are applicable to AIF that are distributed to retail investors. [\[15\]](#)

Host marketing de-notification

To address concerns about divergence, the CBDF Directive sets out procedures for a UCITS and an AIFM to submit a notification that it is terminating marketing of fund in a host Member State.[\[16\]](#) These procedures include conditions covering the following areas that must be fulfilled in the relevant host Member State:

- A blanket redemption/repurchase offer must be made to relevant investors for at least 30 working days;
- The termination of marketing is publicised;
- Contractual arrangements with intermediaries or delegates are modified or terminated.

The CBDF Directive requires the notification to be submitted to the relevant home Member State national competent authority (NCA) who, after verification, will transmit the notification to the relevant host NCAs within 15 working days. Closed-ended AIFs and ELTIFs are excluded from meeting the blanket redemption/repurchase offer condition.

Marketing Requirements

The CBDF Regulation requires NCAs to publish the rules applicable to the marketing of UCITS and AIF in their jurisdiction, including summaries thereof, and provide ESMA with relevant hyperlinks.[\[17\]](#) ESMA will maintain a central database on its website of the summaries of each Member State's marketing rules. It is notable that this aspect of the package is less ambitious than the original proposal from the Commission which envisaged that ESMA would maintain a database of the marketing rules themselves, rather than just summaries.

Marketing Communications

The CBDF Regulation reinforces various requirements for marketing communications that are addressed to investors, including that they are fair, clear and not misleading and that they reference the prospectus and KIID.[\[18\]](#) To address concerns about the timeliness with which host Member States verify marketing communications, the CBDF Regulation imposes a time limitation of 10 working days from receipt of the marketing communications for an NCA to inform a UCITS of amendments the NCA is requesting.[\[19\]](#) This "ex-ante" verification does not prevent an NCA performing "ex-post" verification after a fund has commenced marketing.[\[20\]](#) ESMA will produce a report every two years from 31 March 2021, presenting an overview of the requests made by NCAs for amendments to marketing communications on an ex-ante and ex-post basis and description of the most frequent breaches of marketing requirements.[\[21\]](#)

Pre-Marketing

To harmonise the rules under which an AIFM can test investor appetite for a particular investment idea or investment strategy with investors, the Directive sets out conditions for "pre-marketing" and inserts the following definition into the AIFMD:[\[22\]](#)

"pre-marketing means provision of information or communication, direct or indirect, on investment strategies or investment ideas by an EU AIFM or on its behalf, to potential professional investors domiciled or with a registered office in the Union in order to test their interest in an AIF or a compartment which is not yet established, or which is established, but not yet notified for marketing in accordance with Article 31 or 32, in that Member State"

where the potential investors are domiciled or have their registered office, and which in each case does not amount to an offer or placement to the potential investor to invest in the units or shares of that AIF or compartment”

The conditions for pre-marketing by EU AIFMs include:

- documenting pre-marketing activity;
- submitting a notification to the home Member State NCA(s) within 2 weeks of commencement;
- limiting the information presented to potential professional investors so that it is: (i) not sufficient to allow investors to commit to acquiring units or shares of a particular AIF; and (ii) does not amount to subscription forms, constitutional documents, a prospectus, offering documents or similar documents whether in a draft or a final form;

Any subscription by professional investors within 18 months of the commencement of pre-marketing into a relevant AIF[\[23\]](#) shall be considered to be the result of marketing[\[24\]](#) and therefore subject to cross-border marketing notification requirements.[\[25\]](#) In light of concerns by NCAs over the application of the pre-marketing regime, the Commission is required to report on the extent of “reverse solicitation and demand on the own initiative of an investor”, including distribution in third countries and its impact on the passporting regime within 2 years of the entry into force of the CBDF Regulation.[\[26\]](#) The pre-marketing regime is also copied across to the EuVECA Regulation[\[27\]](#) and EuSEF Regulation.[\[28\]](#)

Cross-Border Marketing Notifications

Industry stakeholders, including ICI Global, have previously raised concerns over various aspects of the system of cross-border marketing notifications for UCITS and AIF. The CBDF Regulation partially addresses aspects of these concerns in respect of fees and charges and the efficiency of the notification process, including the submission of associated information and documents. ICI Global has called for a single marketing regime across the EU.

The CBDF Regulation requires that fees and charges that are levied by NCAs for marketing notifications are published[\[29\]](#) and are consistent with the relevant costs incurred by the NCA.[\[30\]](#) ESMA will develop an interactive tool on its website to enable fees and charges to be calculated.

To improve the efficiency with which cross-border marketing notifications are submitted, the CBDF Regulation requires ESMA to establish a central database of AIFs and UCITS that are marketing on a cross-border basis[\[31\]](#) and to develop a “notification portal” for the submission of associated documents through a standardised process.[\[32\]](#)

Application of PRIIPs KID to UCITS

To take account of concerns over aspects of the Key Information Documents (KID) under the Packaged Retail and Insurance-based Investment Products (PRIIPs) Regulation,[\[33\]](#) the CBDF Regulation delays the application of KIDs to UCITS[\[34\]](#) by two years from 31 December 2019 to 31 December 2021.[\[35\]](#) Furthermore, the CBDF Regulation pushes back the deadline by which the Commission will review the operation of various aspects of PRIIPs by one year from 31 December 2018 to 31 December 2019. This review includes the application of the KID and other aspects such as the “comprehension alert” and the development of online calculator tools. The Commission has already commenced work on aspects of the PRIIPs review, including issuing tenders for consumer testing of performance

disclosures in the KID[36] and the development of online tools for retail investors to compare investment products.[37]

Next Steps

The adopted legislation was signed on 20 June and will be published in the Official Journal shortly, after which it will enter into force 20 days later. Member States are required to transpose the CBDF Directive within 2 years of its entry into force.[38] Certain aspects of the package will be implemented at later points, for instance the publication of a central database on cross-border marketed funds (30 months after entry into force).[39] The various implementing measures will be developed over the next 2 years. Furthermore, the Commission is required to submit reports on reverse solicitation (2 years after entry into force)[40] and the application of aspects of the package to UCITS (4 years after entry into force).[41] Finally, the Commission will review the package 5 years after its entry into force and report its findings within a year of the review.

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endnotes

[1] Council of the EU Press Release “Capital markets union: Council adopts new rules facilitating access to pension products and investment funds”, 14 June 2019, available from <https://www.consilium.europa.eu/en/press/press-releases/2019/06/14/capital-markets-union-council-adopts-new-rules-facilitating-access-to-pension-products-and-investment-funds/>

[2] ICI Global Memo 31145, RE: EU Proposals to Facilitate the Cross-Border Distribution of Investment Funds, 27 March 2018, available from <https://www.iciglobal.org/iciglobal/pubs/memos/ci.memo31145.global>

[3] Directive amending Directives 2009/65/EC and 2011/61/EU with regards to cross-border distribution of collective investment undertakings, <https://ec.europa.eu/transparency/regdoc/rep/1/2018/EN/COM-2018-110-F1-EN-MAIN-PART-1.PDF>

[4] <https://ec.europa.eu/transparency/regdoc/rep/1/2018/EN/COM-2018-92-F1-EN-MAIN-PART-1.PDF>

[5] ICI Global Press Release: Commission Proposal on Cross-Border Distribution of Funds Falls Short on Critical Issues, 12 March 2018, available from https://www.iciglobal.org/iciglobal/policy/rules/ci.18_news_icig_ec_crossborder.global

[6] ICI Global Memo 31204, RE: EU Cross-Border Distribution Proposals – ICI Global Feedback, 10 May 2018, available from https://www.iciglobal.org/iciglobal/pubs/memos/ci.memo31204.global#_ftn3

[7] European Commission Press Release “Capital Markets Union: Agreement reached on measures to improve the EU’s investment fund market”, 5 February 2019, available from http://europa.eu/rapid/press-release_IP-19-861_en.htm

[8] <https://data.consilium.europa.eu/doc/document/PE-54-2019-INIT/en/pdf>

[9] <https://data.consilium.europa.eu/doc/document/PE-53-2019-INIT/en/pdf>

[10] Article 92, UCITS Directive

[11] Recital 5, CBDF Directive

[12] New Article 92(2), UCITS Directive

[13] New Article 92(3), UCITS Directive

[14] New Article 92(3)(b), UCITS Directive

[15] New Article 43a, AIFM Directive

[16] For UCITS the relevant provision is a new Article 93a to be inserted into the UCITS Directive and for AIFMs the relevant provision is a new Article 32a to be inserted into the AIFMD.

[17] Article 5, CBDF Regulation

[18] Article 4, CBDF Regulation

[19] Article 7, CBDF Regulation

[20] Article 7(2), second sub-paragraph, CBDF Regulation

[21] Article 8(2), CBDF Regulation

[22] Article 2, Cross-Border Directive

[23] Recital 10 deems such AIF to include “AIF referred to in the information provided in the context of pre-marketing or an AIF established as a result of pre-marketing”

[24] Article 4(1)(x), 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”.

[25] Article 31 and 32, AIFMD

[26] Article 18, CBDF Regulation

[27] Article 15, CBDF Regulation

[28] Article 16, CBDF Regulation

[29] Article 10, CBDF Regulation

[30] Article 9, CBDF Regulation

[31] Article 12, CBDF Regulation

[32] Article 13, CBDF Regulation

[33] Regulation 1286/2014 on key information documents for packaged retail and insurance-based investment products (PRIIPs), available from <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32014R1286>

[34] Article 32(1), PRIIPS Regulation

[35] Article 17, CBDF Regulation amendment to Article 32(1) of the PRIIPS Regulation

[36] Consumer testing services – Retail investors’ preferred option regarding performance scenarios and past performance information within the Key Information Document under the PRIIPs framework – FISMA/2019/016/C, 17 April 2019, available from https://ec.europa.eu/info/tender/retail-investors-preferred-option-kid-priips_en

[37] EU Tenders Electronic Daily, <https://ted.europa.eu/udl?uri=TED:NOTICE:298069-2018:TEXT:EN:HTML>

[38] Article 3, CBDF Directive

[39] Article 12, CBDF Regulation

[40] Article 18, second sub paragraph, CBDF Regulation

[41] Article 5, CBDF Directive