

# EFAMA'S RESPONSE TO ESMA'S CONSULTATION ON DRAFT IMPLEMENTING TECHNICAL STANDARDS UNDER THE REGULATION ON CROSS-BORDER DISTRIBUTION OF FUNDS

30 June 2020

## INTRODUCTION

Responding to this consultation, EFAMA<sup>1</sup> welcomes the opportunity to formulate a series of suggestions we deem complementary to support the gradual removal of cross-border distribution barriers for funds in Europe. Our main considerations are summarised in the following points:

- The information to be published by NCAs should be exhaustive, frequently updated and limited to national requirements that are pertinent to the distribution of investment funds and related consumer protection laws. In addition to the official language(s) used within the Member States, this information should also be in English and hyperlinks should offer access to all relevant national laws, regulations and administrative provisions;
- In relation to the format of the publications, ESMA should ensure convergence around a common, harmonised template, while the information contained therein should be exhaustive and comparable between EU Member States. As a blueprint for such template, we recommend ESMA refer to several forms of existing templates, as typically made available by law firms, consultancies and audit firms to their private clients. We provide an example of such template (see infra);
- Notwithstanding the limited legal basis for the ITS under the Regulation (EU) 2019/1156, the scope of the ITS would deserve to be broadened to include de-notification requirements as well. The amending Directive 2019/1160 lays out multiple conditions and requirements to which the same rationale behind the present ITS should apply;
- Any existing pre-marketing requirements and best practices should also be disclosed by NCAs ex-ante to the benefit of prospective asset management companies looking to test local investors' demand for a given investment strategy and prior to a formal notification for distributing their UCITS or AIFs;
- With regard to information related to regulatory fees and charges, we agree with the proposed data fields in the consultation document, although we recommend considering additional data fields to enhance their clarity; and
- While strongly supporting the creation of a central database for cross-border fund listings, we believe its information should have legal value and bring greater certainty to all players involved in the fund value chain. In addition, ESMA and the NCAs should ensure the database is (technologically) enabled to be fed and updated automatically based on the filings of individual asset management companies across the EU. To be valuable in its completeness, the database should identify passported funds or sub-funds at the share class level via the related ISIN/LEI code.

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<sup>1</sup> EFAMA is the voice of the European investment management industry, representing 28 member associations and 59 corporate members. At end 2019, total net assets of European investment funds reached EUR 17.8 trillion. These assets were managed by close to 34,200 UCITS (Undertakings for Collective Investments in Transferable Securities) and 29,000 AIFs (Alternative Investment Funds).

## QUESTIONS

**Q1. Do you agree that the information to be published should concern not only requirements applicable specifically to the marketing of investment funds, but should also encompass a general statement relating to the potential application of other bodies of law applicable within the concerned jurisdiction, such as rules on the protection of consumers in general? If so, do you agree that this general statement could take the form of a general disclaimer which refers to a non-exhaustive list of relevant bodies of law?**

EFAMA believes that the information to be published should be as complete as possible, although limited to national requirements that are pertinent to the distribution of investment funds and related consumer protection laws. Additional references to other sources of law which are not specific to fund distribution, or to financial product distribution more generally, would risk undermining legal clarity by (i) multiplying references to legal texts with very different scopes and for which translations may not be readily available; and by (ii) opening up avenues for different and possibly conflicting interpretations, requiring these to potentially be settled through lengthy legal proceedings. Both outcomes promise to stifle cross-border fund distribution considerably.

Agreeing with ESMA that consumer protection law is central to any distribution regime, we believe the former is already “baked-into” the existing national distribution regimes for fund and other financial products, although precise references (and timely updates thereto) would also be necessary as a reinforcing element. The NCA’s website should include hyperlinks to the full version of all laws, regulations and administrative provisions applicable in this regard. Where not already captured under the national fund distribution requirements, references to the relevant tax reporting requirements are also worthwhile.

Lastly, we note that the consultation document is silent on the conditions governing the de-notification regime under the amending Directive 2019/1160 for both AIFs (Article 32a) and UCITS (Article 93a). Despite the scope of the ITS is limited to that defined under the Regulation (EU) 2019/1156, ESMA must necessarily consider clarifying the above articles’ relevant paragraphs (paragraphs 2 et seq.) in this respect, beginning with the notification requirements to the funds’ home Member State NCA, as well as the related de-notification costs and any residual requirements for the management company (e.g. including fees and any obligations vis-à-vis remaining investors in particular). We invite ESMA to consider the minimum information requirements in relation to de-notification, as per our indicative template in our answer to Q2. below.

**Q2. Do you agree with the proposed approach regarding the format of the publications to be made by NCAs on their websites in respect of marketing requirements for UCITS and AIFs? If not, please provide alternative suggestions.**

For the purpose of harmonising forms and templates, we argue that more detail is in fact necessary. The format for future NCA publications will need to guarantee that the information, is usable, exhaustive, as well as comparable between one jurisdiction and another. More general formats limited to only disclosing key requirements – as the ESMA consultation paper appears to suggest – risk leading NCAs to perform a mere “box-ticking” exercise of little value for UCITS/AIF management companies. In particular, the future ITS should to the extent possible avoid statements as those inviting such stakeholders to contact NCAs to obtain general information. Also, a link from the ESMA website to the NCA’s respective website would be helpful.

Our Members’ experience confirms that there are already several existing templates to choose from, as those typically made available by law firms, consultancies and audit firms to their private clients (often UCITS/AIF management companies). Below is an indicative example of how a form/template could be

organised, drawing from the ones already in use between the above service providers and their investment management clients. Where needed, EFAMA would welcome the opportunity for a future consultation on an ESMA-proposed draft template.

<b>Overview</b>
Investment fund market & distribution
Fund regulatory framework
The supervisory authority
Other useful links
Exhaustive applicable laws and regulations applicable to foreign funds
<b>(Public) Distribution vs. private placement</b>
Per categories of investors and type fund (UCITS/Open-end and close-end AIF/Other foreign funds)
Distribution activity & authorisation/approval needed per investor category
Pre-marketing rules
Definition of the activities considered as distribution
<b>AIFMD and UCITS marketing passport (AIFs vs. UCITS)</b>
Regulatory notification fees
Contents of notification file
Local agent(s) requirements and responsibilities
Partial registration
Miscellaneous
<b>Registration application maintenance</b>
Document update requirements
Regulatory maintenance fees
Local financial, regulatory, statistical & tax reporting requirements
Other important information
Publication requirements and related language requirements (NAV/investor notification in case of changes, general meetings or dividend distributions)
<b>Deregistration process</b>
Termination of vehicles' distribution
Deregistration of sub-funds
<b>Marketing material</b>
Key requirements
Key information

Only once ESMA has determined a common template for all NCAs to use, a user-friendly option for NCAs to consider and one promising to expedite access to information, could be to structure the template to offer access to the relevant information through a “question tree”. Accordingly, answers to a series of targeted questions will step-wise lead the prospective management company to discover all the information needed. We reiterate that the latter approach should be optional for NCAs and pursuable only once ESMA has determined an appropriate common template.

Where disclosures need to be made in more than one language on an NCA's website, it may be difficult for prospective management companies to find the relevant information. The opportunity of an appropriate “search tool” should be considered, allowing key word recognition (e.g. “fees”, “charges” or “cross-border activities”) in English. Notwithstanding this, we believe that NCAs should in any case offer an English version of their template and related information, saving prospective asset management companies a considerable amount of time and resources.

**Q3. Do you agree with the approach taken regarding the main characteristics of the summary of marketing requirements that NCAs shall publish on their websites? If not, please provide details on the elements that you would favour including in the text or in table.**

We agree on the proposed objectives of the summaries, provided these anticipate the contents of the more detailed template - as per our answer to Q2. above – even if more generically. It would also be useful for ESMA to consider limiting these summaries to a specific wordcount thereby harmonising their length. Besides the hyperlinks where more detailed information can be found, contact details should also be included (for instance, where companies could raise outstanding questions).

As a further consideration, while recognising that the amending Directive 2019/1160 to the UCITS/AIF cross-border marketing regime has stopped short of extending the conditions for pre-marketing to UCITS, there are nevertheless important disclosures that would greatly assist the pre-marketing of AIFs and UCITS in new jurisdictions. To this effect and pending further EU-wide harmonisation in this field, NCAs should disclose their domestic pre-marketing requirements (in a summary format), along with any best practices, to prospective UCITS/AIF management companies while testing investment ideas or strategies with a prospective client base.

**Q4. Do you agree with the approach taken with respect to the scope of regulatory the fees and charges to be published by NCAs on their websites?**

Yes, EFAMA welcomes the proposed approach, as it is often difficult to determine the amount of fees and charges. The disclosure of fixed fees should, as a minimum, be considered as a default option. In addition, we suggest the final ITS also refer to applicable tax liabilities for management companies, however recognising that, in order to be meaningful, such information would also need to include all changes and recent interpretations from tax authorities to the extent possible. Also, in line with our comments made above, any relevant fees, charges and applicable taxes related either to the pre-marketing regime, or to the de-notification of a UCITS/AIF fund (or sub-fund), should be disclosed.

**Q5. Do you agree that the publication to be made by NCAs under this ITS should be made in the form of a table? If not, do you have any alternative suggestion on the format of the publication on regulatory fees and charges?**

Yes, EFAMA welcomes the proposed approach.

**Q6. Do you agree that NCAs have the option to supplement the tables setting out the details of the fees and charges with a full text providing detailed information on the fees and the fee calculation, if a table would risk giving incomplete or misleading information?**

Yes, EFAMA welcomes the proposed approach, provided the additional full text is complementary and clearly linked to the relevant rows/fields in the table.

**Q7. Do you agree with the content of the table? Do you think any other information should be published by NCAs in relation to the regulatory fees and charges?**

We agree with the proposed data fields for the table - as per paragraph 24 of the consultation document - although wish to complement them by suggesting the following important clarifications:

- A clear distinction between initial, ongoing and one-off fees, including details around when they need to be paid, or if and when they may be expected to change. For instance, is a payment mandatory if no effective marketing has occurred during the first year or thereafter? If the date of registration occurs during the first year X and marketing has occurred, are the annual fees to be paid the same year, or only as from the following year X+1? For any payments due for year X, are pro-rata payments envisaged?
- A clarification of the conditions applicable in the case of a de-notification; e.g. will annual fees (if any) continue to be due in case the relevant investment fund (or sub-fund) has been de-notified? Will the amount be the same, or less, and starting from when? Is there a particular procedure applicable, or is this automated and linked to the de-notification made?
- A description of the payment route, e.g. is the payment required to go through a local agent, or are other possibilities foreseen?
- A clarification of the invoicing format, e.g. will the invoice be mailed out, sent by email, to which entity, when? When will the invoices be due? These details are moreover foreseen under Article 9(2) of the Regulation (EU) 2019/1156 amending the UCITS/AIF cross-border marketing regime.

Where not in the table itself, the above clarifications could alternatively be addressed through a harmonised Q&A section on the NCAs' websites. Lastly, hyperlinks should be provided to access all information in greater detail and ESMA could consider recommending that NCAs offer a practical online calculator for fees and charges reflecting those disclosed in the table.

**Q8. Please specify the use you would make of the information to be contained in the central database listing UCITS and AIFs marketed on a cross-border basis. Do you have any suggestion regarding the format of this central database?**

Recognising that the details related to the central database are to be settled between ESMA and the NCAs, EFAMA nevertheless considers that indicating marketed funds or sub-funds – necessarily including distinctions at share-class level - with their own ISIN/LEI codes is essential if the database is to be complete and of value for our industry, as well as for investors and NCAs.

Apart from benefitting all stakeholders – including investors and fund distributors - from the enhanced transparency of EU fund distribution across Member States' borders, the database will be valuable to verify whether registration has been successful and whether third-party distributors (e.g. fund platforms) are indeed authorised to distribute one or more funds/sub-funds (and related share classes) in a host jurisdiction in conformity with the UCITS/AIFM Directives' requirements on cross-border distribution. This will be precious particularly for management companies to verify that distribution is effectively occurring only in those jurisdictions where a fund/sub-fund/share class has been notified.

Lastly, information contained in the ESMA database shall have legal value. Consequently, the database should be maintained up to date, with the NCAs ensuring they have the technical means for it to be fed and updated automatically based on the filings of individual asset management companies. We believe investment management companies deserve to be involved as partners for the further development of this project.