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LONG TERM INVESTORS

On behalf of the Public Affairs Executive (PAE) of the EUROPEAN PRIVATE EQUITY AND VENTURE CAPITAL INDUSTRY

30 June 2020

Response to the ESMA Consultation Paper “Draft implementing technical standards under the Regulation on cross-border distribution of funds”

Introductory Comments

The Public Affairs Executive (‘PAE’) of Invest Europe, the association representing the European private equity, venture capital and infrastructure investment industry, welcomes the opportunity to comment on and to provide input to the draft Implementing Technical Standards (ITS) under the Regulation on Cross-Border Distribution of Funds (CBDF).

Even though the consultation paper mainly relates to public disclosure obligations for national competent authorities, as opposed to fund managers, the ITS can have direct and indirect impacts and implications and/or play a facilitating role for our members.

In particular, we appreciate the envisaged increased transparency on the legal and regulatory framework applicable in each Member State with regard to the conditions for marketing AIFs and the imposition of fees and charges - two areas dealt with by the CBDF legislation of specific importance for private equity and venture capital fund managers. As many of the new CBDF rules (e.g. in relation to pre-marketing and de-notification) are laid out in a Directive, which needs to be transposed into national law by Member States, there remains a chance that diverging national practices and interpretations will emerge. Therefore, it would be helpful for fund managers as well as investors to get direct access to an overview of the precise requirements and conditions on the websites of the relevant national competent authorities.

That said, it will be important to make sure that national competent authorities do not use their public disclosure obligations to impose additional administrative and/or reporting requirements on fund managers that fall within the scope of the CBDF legislation.

A. Website publication of marketing requirements (Article 5(3) of the Regulation)

A1. Scope of the information to be published by NCAs on their websites

1. **Question 1:** 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?

Answer:

Yes.

Invest Europe shares ESMA's view and sees value in national competent authorities publishing information on their website relating to the specific requirements for both the domestic and cross-border marketing of investment funds which are applicable within their jurisdiction. In addition, we support ESMA's suggestion that national competent authorities should also make reference to other bodies of domestic law which are not set out specifically for the marketing of AIFs but may be applicable at the occasion of marketing.

Given the divergent stances taken by Member States, it would be particularly helpful if this information could include details on national marketing rules and requirements for non-EU AIFs and non-EU AIFMs - an area which remains subject to national law and the national private placement regimes (NPPRs). As part of that disclosure, it would be beneficial if Member States could clarify whether these rules and requirements for non-EU AIFs and AIFMs are generic or are likely to vary from one non-EU country to another.

Another example of information that could helpfully be published relates to the marketing of AIFs to semi-professional investors. Again, in light of the divergence across Member States of the regimes and the rules they include that are applied by Member States, the industry would benefit from more transparency on these semi-professional marketing regimes.

A2. Format of the publication of complete and up-to-date information on marketing requirements on NCAs' websites

2. **Question 2:** 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.

Answer:

Yes.

The use of a common format will improve accessibility, comparability and efficiency, and ensure alignment between the information provided by national competent authorities across Member States. Such consistency would be hugely beneficial and helpful for fund managers who are marketing across borders and need to navigate a patchwork of diverging national rules and requirements.

We also agree with the proposed approach to focus on highlighting the requirements applicable to each type of fund (or types of funds). As set out in Annex I “Template for the publication of national provisions governing marketing requirements for AIFs and UCITS” of the draft ITS (emphasis added):

“Insert up-to-date and complete information on the applicable national laws, regulations and administrative provisions governing marketing requirements for each type of AIF separately, including the hyperlinks to the full version of those laws, regulations and administrative provisions.”

Given the diversity of the AIF/AIFM universe, differentiating between types of fund will make it easier for fund managers, investors and other relevant stakeholders to find the information that they are looking for. In fact, the more specific such a distinction can be, the more helpful it will be. For example, if the marketing requirements vary:

- between private equity AIFs and other types of AIF, or
- between closed-ended and open-ended AIFs, or
- based on the legal form, or
- based on the type of investors being approached,

then that should be outlined and elaborated on.

In addition, it would be useful to make a distinction between the marketing requirements under the NPPRs in relation to Articles 36, 42 and 43 AIFMD.

Finally, recognising that the AIF universe is very diverse, we appreciate that it could be challenging to obtain clear statements from national competent authorities without having a global and harmonised European classification. Perhaps this is something that could be considered in this context.

A3. Format of the publication of the summaries of marketing requirements

3. **Question 3:** 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.

Answer:

Yes.

Invest Europe welcomes the increased transparency and clarity that will be achieved by national competent authorities publishing a summary of marketing requirements applicable in their country.

We support the suggested approach that such summaries should give sufficient information to understand the main steps to be taken with a view to marketing AIFs in the concerned jurisdiction.

In particular, the ITS state that these summaries “should not be designed as exhaustive lists of the marketing requirements, nor constitute a legally binding document for the NCAs”. While we agree with the latter, we do believe that a certain level of granularity on the actual marketing requirements would be helpful and meaningful. To be clear, it is agreeable that the lists should not be “exhaustive” in the sense of being very detailed, but they should nevertheless be clear and complete, and not omit a specific body of law.

More concretely, it will be important to ensure that these summaries include the type of information that market participants are in particular looking for. For example:

- Are there regulatory reporting requirements beyond those in Annex IV?
- What documents/information should be notified in relation to ongoing AIF obligations?
- What is the timeline for approval?
- List of documents/information that must be provided as part of the application for Articles 36 to 42.

In addition, it would be helpful to work with sub-headings in order to present the information in an orderly, structured and consistent way. Examples of such sub-headings include:

- Security offering laws
- Licencing laws
 - For fund managers
 - For intermediaries (e.g. placement agents)
- Tax rules
- Other registrations (e.g. with the local trade registry)
- Other consumer protection rules

There is an important balance to be struck between the level of detail and the actual added value of the information provided. Ultimately, the ambition should be that fund managers, investors and other stakeholders are able to access and use the information without needing the advice of experts. A mere list of hyperlinks without any further explanations should be avoided.

B. Website publication of regulatory fees and charges (Article 10(3) of the Regulation)

B1. Scope of the regulatory fees and charges to be published by NCAs on their websites

4. **Question 4:** Do you agree with the approach taken with respect to the scope of regulatory fees and charges to be published by NCAs on their websites?

Answer:

Invest Europe welcomes the increased transparency that will be obtained by national competent authorities publishing up-to-date and complete information about the fees or charges they levy for carrying out their duties in relation to the cross-border activities of AIFMs and EuVECA managers within their jurisdiction, or, where applicable, the calculation methodologies for those fees or charges.

Invest Europe supports the suggested approach that this information should be understood as “encompassing all existing regulatory fees and charges levied by NCAs in relation to any cross-border activities within their jurisdiction, whether inwards or outwards”, implying that this should cover both cross-border *marketing* and *management* activities as well as their legal basis in the Member State’s law. This should make it possible for fund managers to determine in advance the overall cost of cross-border activities within each Member State.

Perhaps it could be considered to present this information in the form of a Q&A to facilitate the understanding. We believe that such an approach would/could add clarity and structure to the disclosure by national competent authorities.

Finally, we agree with ESMA’s suggestion that, for the avoidance of doubt and for the sake of completeness, national competent authorities should make it clear that there are no fees or charges other than those listed on their websites.

B2. Format of the information to be published by NCAs on their websites regarding regulatory fees and charges

5. **Question 5:** 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?

Answer:

Yes.

We agree with ESMA's proposed approach intended to strive for harmonisation and consistency (which, in turn, will increase comparability), and to ensure disclosure of all relevant details of the fees and charges levied for cross-border activities of fund managers in a clear and comprehensive manner.

A table format seems to be the best option to present all the information in an orderly and accessible way.

6. **Question 6:** 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?

Answer:

Yes.

As the amount, structure, basis and frequency of the fees and charges levied by national competent authorities may differ from one Member State to another, it would be beneficial to provide national competent authorities with the flexibility and possibility to add some explanatory text. This kind of additional information will be particularly helpful for fund managers marketing across multiple jurisdictions.

7. **Question 7:** 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?

Answer:

Yes.

The template proposed in Annex III of the ITS already looks very comprehensive and seems to capture the right categories:

- a detailed breakdown of the different types of applicable regulatory fees and charges, including the amount to be paid as either a fixed fee or a percentage (including the calculation basis and methodology, 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.

However, for the sake of completeness, it may be worth considering adding the following pieces of information:

- the period of time for which AIFMs are liable to pay fees;
- how such fees and charges may be modified by national competent authorities or local lawmakers;
- when payment(s) should be executed;
- a clear distinction between each type of fee or charge depending on each scenario faced (e.g. Article 31, Article 32, Article 36, Article 42, Article 43 AIFMD);
- in case of a periodic fee, the steps that can be taken (if any) to avoid ongoing fee payments. This is particularly relevant when a fund manager wants to withdraw or cancel its registration if the fundraising in a certain Member State was not successful.

Finally, in accordance with Article 9 of Regulation (EU) 2019/1156, ESMA may want to consider disclosing information on how consistency with the overall cost relating to the performance of the functions of the national competent authorities is assessed.

C. Central database listing funds marketed on a cross-border basis (Article 13(3) of the Regulation)

8. **Question 8:** 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?

Answer:

As a general starting point, we believe that the central database can play an important role in increasing transparency, helping investor protection and harmonising the level of information disclosed in the EU. Currently, details about which fund / sub-fund (if any) has been passported or authorised locally are not always clear or even accessible.

In more practical terms, we expect that the database will be consulted mainly for market intelligence purposes, i.e. to collect information on issues like:

- Name of AIF
- Name of AIFM
- Target size
- Date of registration
- Category of the AIF's investment strategy

This can be particularly relevant for an investor (or an advisor to an investor) when they are doing due diligence on funds they want to invest in and in the context of mergers and acquisitions.

The same goes for fund managers, who might also use the central database for completing AML / KYC checks on other funds with whom they are dealing on a transaction (for example, to ensure that the funds that have been communicated as part of KYC are formally registered). As such, ESMA’s database would be an independent third party source.

As regards the format, the central database should be a user-friendly and search engine optimized website. It is also important that the information is easily searchable on the website.

A table may be one good way to achieve this. For example, such a table could have a row for each fund / sub-fund with columns on investment fund managers and the country of domicile of the fund, of the manager and of marketing:

Fund (AIF/UCITS)	Sub-fund (if any)	Investment Fund Manager	Fund domicile	Manager domicile	Marketed in (ISO2)
Fund A	Sub-fund X	Manager1	CountryA	CountryB	COUNTRIES X, Y, Z
Fund A	Sub-fund Y	Manager1	CountryA	CountryB	COUNTRIES X, Y, Z



Contact

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About the PAE

The Public Affairs Executive (PAE) consists of representatives from the venture capital, mid-market and large buyout parts of the private equity industry, as well as institutional investors and representatives of national private equity associations (NVCAs). The PAE represents the views of this industry in EU-level public affairs and aims to improve the understanding of its activities and its importance for the European economy.

About Invest Europe

Invest Europe is the association representing Europe's private equity, venture capital and infrastructure sectors, as well as their investors.

Our members take a long-term approach to investing in privately held companies, from start-ups to established firms. They inject not only capital but dynamism, innovation and expertise. This commitment helps deliver strong and sustainable growth, resulting in healthy returns for Europe's leading pension funds and insurers, to the benefit of the millions of European citizens who depend on them.

Invest Europe aims to make a constructive contribution to policy affecting private capital investment in Europe. We provide information to the public on our members' role in the economy. Our research provides the most authoritative source of data on trends and developments in our industry.

Invest Europe is the guardian of the industry's professional standards, demanding accountability, good governance and transparency from our members.

Invest Europe is a non-profit organisation with 25 employees in Brussels, Belgium.
For more information please visit www.investeurope.eu.

