9 September 2022

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

Industry response to the ESMA Consultation Paper "Draft technical standards on the notifications for cross-border marketing and cross-border management of AIFs and UCITS" (ESMA34-45-1471)

DRAFT RTS ON THE INFORMATION TO BE NOTIFIED BY MANAGERS TO CARRY OUT THEIR ACTIVITIES IN A HOST MEMBER STATE

Question 2 - Do you agree with the content of the provisions of the second chapter of the draft RTS as regards the information to be notified in relation to the provisions of activities in a host Member State by an *AIFM*? If not, please justify your position and make proposals of amendments.

Generally, yes, with the following exceptions:

(a) With respect to Article 5(2)(b), the reference to "categories of targeted clients and investors" should be clarified. As drafted, it is unclear whether the intention is to delineate between professional and retail investors, or different segments of the investor community (e.g., pension plans, sovereign wealth funds, family offices, high net worth individuals). As a minimum, we would propose that ESMA's intention be clarified within the programme of operations included in the cross-border management notification letter template (Annex V).

(b) In addition, with respect to Article 5(2)(e)(ii), as drafted, this assumes that the master AIF and AIFM will be EU domiciled, which may not be the case for AIFs which are not marketed pursuant to Articles 31 or 32 AIFMD.

(c) It's worth pointing out our members will typically not be able to precisely describe the envisaged marketing strategy for each AIF and in particular the categories of targeted clients as they generally only disclose the type of distribution (intermediated or not);

(d) It should be clarified that delegation arrangements only relate to the activities mentioned in the programme of operations (article 5 paragraph 2 letter c);

(e) Depositaries may take some time (up to 3 weeks or longer) to issue the ISIN code of the AIF.

This code should therefore only be required "if available at the time of the notification".

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(f) Regarding the notification letter on cross border management of AIFs through a branch (Article 6 of the draft RTS), we are concerned that providing the name of a specified contact person risks implying frequent updates- it would be more convenient to provide the contact details of a service/department

More generally, practical considerations as regards the update of the information provided to the competent authorities should be taken into account (Article 7 of the draft RTS). Indeed, frequent updates will not be convenient in practice, neither for the AIFMs nor for their competent authorities. For example, updating the name of a specified contact person may be required too frequently. We believe that only material changes should be communicated to the authorities (article 7 paragraph 1).

DRAFT ITS ON THE FORM AND CONTENT OF NOTIFICATION LETTERS

NOTIFICATION LETTER FOR THE MARKETING OF AIFS IN THE HOME MEMBER STATE OF THE AIFM

Question 7 - Do you agree with the template notification letter set out in Annex III of the draft ITS? If not, please specify the items for which you foresee a different approach and make alternative proposals.

With respect to the cover page of the domestic marketing notification letter template, we would recommend substituting the question "Are you notifying **amendments** to information already provided in an initial notification?" with "Are you notifying **material changes** to information already provided in an initial notification?" (emphasis added), to align with the requirement to notify material changes in Article 31(4) AIFMD.

Frequent updates will not be convenient in practice, neither for the AIFMs nor for their competent authorities. For example, updating contact details every time a new person takes a position should be avoided. We therefore propose providing the contact details of the "service/department", rather than the "name/position" of the person in charge of invoicing.

With respect to Part 1 of the domestic marketing notification letter template, we would recommend clarifying that the requirement to attach "the latest version of the offering document (e.g. prospectus)" applies "(to the extent applicable)". It is noted that, in the private equity/venture capital industry at least, not all AIFMs will prepare an offering document when marketing an AIF and will instead produce a regulatory disclosure document (which is already addressed in the letter, within the reference to "any additional information referred to in Article 23(1) of Directive 2011/61/EU for each AIF the AIFM intends to market").

This is a growing trend in the industry, in particular within the venture capital and growth equity space, as well as in the context of single asset and continuation funds (circumstances in which the prospective investors are already very familiar with the underlying asset(s)), where there is a compressed marketing timeline and a desire amongst managers and investors to put capital to work quickly.

In addition, we note the requirement to attach the "latest version" of the AIF rules or instruments of incorporation and the offering document. This represents welcome recognition that, in the private funds space, the AIF rules or instruments of incorporation and the offering document are inevitably subject to change prior to closing, principally as a consequence of investor negotiations during the marketing stage. Moreover, in the case of AIFs structured as limited partnerships (the most prevalent fund structure in the private equity/venture capital market), often those AIFs will be constituted on a short-form basis, and marketed with a draft amended and restated limited partnership agreement, which is only legally adopted at closing. We would therefore recommend, in the case of the AIF rules or instruments of incorporation and

the offering document, substituting "latest version" for "latest version or latest draft (as applicable)" to better reflect commercial practice.

With respect to Part 2 of the domestic marketing notification letter template and the first table therein:

a) With respect to the requirement to state the "Legal form of the AIF", it would be helpful if the accompanying footnote clarified, in the case of an AIF which is neither a common fund, unit trust nor investment company, whether the requirement is to state the legal form, or whether it is sufficient to state "other legal form" (e.g.: limited partnership). As drafted, this is unclear and may lead to a divergence in approaches.

b) With respect to the requirement to state the "Duration of the AIF", this should be "(if applicable)", on the basis that certain AIFs may be "evergreen". For AIFs which do have a fixed term, please note that it may still not be possible to specify a precise date, since the term of the AIF may be expressed as being a number of months or years from a particular event.

c) The requirement to state the "AIF national identification code" should be "(if applicable)", in case certain Member States do not issue national identification codes, particularly in view of the legal form of the undertaking, or the national identification code is not available at the time of submission of the marketing notification.

Question 8 - As indicated in Section 1 of Part 3 of the template notification letter set out in Annex III of the draft ITS, AIFMs are required to provide information on the "envisaged marketing strategy in the home Member State in relation to each AIF the marketing of which is intended". What type of information could you provide in this context, including any type of indicator or supporting document?

Invest Europe response:

Other types of information that could be provided with respect to the envisaged marketing strategy of the AIFM may also include: (a) whether the AIFM anticipates having virtual and/or physical meetings with prospective investors; (b) whether the AIFM anticipates establishing a secure data room; and (c) whether the AIF will be marketed exclusively to investors with which the AIFM has an existing relationship, or whether the AIFM anticipates marketing to new investors.

It is unclear what indicators or supporting documents the AIFM would be able to provide in respect of this point.

During fundraising, multiple entities may be appointed to conduct marketing and it would be impractical to have to notify the competent authority every time this list changes. Such list should be provided "at the time of notification".

Question 9 - Please provide feedback on whether information on the envisaged marketing of AIFs in the home Member State of the AIFM would be available, in particular as regards the minimum and maximum capital raising target, the expected duration of the marketing and the revenues treatment? If not, please explain why this information would not be available when notifying the intention to market a given AIF.

Invest Europe response:

Maximum capital raising targets are not always set in the private equity/venture capital industry. Where they are set, they are subject to change, including as a result of investor sentiment and the prevailing fundraising environment. Because this data point either may not be applicable to a given AIF, or where it is applicable, subject to change, we do not consider it should be included within the domestic marketing notification letter template.

Similarly, minimum capital raising targets are often not set in the private equity/venture capital industry. There will inevitably be a minimum amount of capital commitments at which it is not economically viable to launch a fund, but this would represent the AIFM's internal assessment and would not be a specified fund term. Minimum capitalisation requirements may arise by operation of law, but these are usually de minimis relative to the amount of capital expected to be raised, and so do not merit being stated.

Conversely, the duration of the marketing period is often limited in the private equity/venture capital industry and could theoretically be stated, noting however that it is again subject to change (sponsors sometimes seek to extend the marketing period, subject to investor consent (where required)). It may not be possible to stipulate a precise date in any event, as the marketing period may be expressed as being a number of months or years from a particular event (e.g.: first close).

NOTIFICATION LETTER FOR THE CROSS-BORDER MARKETING OF AIFS

Question 10 - Do you agree with the template notification letter set out in Annex IV of the draft ITS? If not, please specify the items for which you foresee a different approach and make alternative proposals.

Invest Europe response:

Each of the points made above in the context of the domestic marketing notification letter template (Question 7) apply equally to the cross-border marketing notification letter template.

Compared to the template applicable notification letter for the marketing of AIFs in the home Member State, the notification letter for the cross-border marketing of AIFs adds:

- A section on facilities to retail investors (if applicable)
- Details on exemptions from rules or requirements applicable in the Member State where the AIF is intended to be managed in relation to marketing arrangements.

As explained previously, distribution to retail investors is not harmonised at EU level and remains governed by national rules. Therefore, information on facilities to retail investors should be as per the rules of the host Member States.

In this context, it would be useful to include a link to the document published on its website by ESMA containing the hyperlinks to the websites of competent authorities where they publish complete and up-to-date information on the applicable national laws, regulations and administrative provisions governing marketing requirements for AIFs and UCITS, as well as the summaries thereof, and the hyperlinks to the websites of competent authorities where they publish and maintain complete and up-to-date list of the fees and charges they levy for carrying out their duties in relation to the cross-border activities of fund managers.

It should be noted that the AIFM, rather than a facility, may perform the different tasks listed in the table proposed by ESMA, depending on local rules.

Last, we would like to stress that the current review of the ELTIF Regulation will amend obligations regarding facilities for retail investors.

Question 11 - As indicated in Section 1 of Part 3 of the template notification letter set out in Annex IV of the draft ITS, AIFMs are required to provide information on the "envisaged marketing strategy in the host Member State in relation to each AIF the marketing of which is intended". What type of information could you provide in this context, including any type of indicator or supporting document?

Invest Europe response:

Each of the points made above in the context of the domestic marketing notification letter template (Question 8), apply equally to the cross-border marketing notification letter template.

It would be useful to include in this section a link to the document published on its website by ESMA containing the hyperlinks to the websites of competent authorities where they publish complete and up-to-date information on the applicable national laws, regulations and administrative provisions governing marketing requirements for AIFs and UCITS, as well as the summaries thereof, and the hyperlinks to the websites of competent authorities where they publish and maintain complete and up-to-date list of the fees and charges they levy for carrying out their duties in relation to the cross-border activities of fund managers.

Question 12 - Please provide feedback on whether information on the envisaged marketing of AIFs in the host Member State would be available, in particular as regards the minimum and maximum capital raising target, the expected duration of the marketing and the revenues treatment? If not, please explain why this information would not be available when notifying the intention to market a given AIF.

Invest Europe response:

Each of the points made above in the context of the domestic marketing notification letter template (Question 9), apply equally to the cross-border marketing notification letter template.

NOTIFICATION LETTER FOR THE CROSS-BORDER MANAGEMENT OF AIFS

Question 13 - Do you agree with the template notification letter set out in Annex V of the draft ITS? If not, please specify the items for which you foresee a different approach and make alternative proposals.

Invest Europe response:

With respect to Part 2, Section 1, as noted in the response to Question 2 above, it is unclear whether the question requesting details of the "types of investors with which the AIFM will be dealing" is seeking to delineate between professional and retail investors, or different segments of the investor community. In any event, it is suggested that the language is harmonised with the RTS – the cross-border management notification letter refers to "types of investors", whereas Article 5(2)(b) of the RTS refers to "categories of… investors", which may cause confusion.

With respect to Part 2, Section 2, of the cross-border management notification letter template and the first table therein, the requirement to state the "Date of incorporation or constitution of the AIF" should be "(if

established)". In some circumstances, it may not be possible to incorporate the relevant legal vehicle until approval of the competent authority to management of the AIF has been received.

As also noted above with respect to the marketing notification letter templates:

(a) Concerning the requirement to state the "Legal form of the AIF", it would be helpful if the accompanying footnote clarified, in the case of an AIF which is neither a common fund, unit trust nor investment company, whether the requirement is to state the legal form, or whether it is sufficient to state "other legal form" (e.g., limited partnership). As drafted, this is unclear and may lead to a divergence in approaches.

(b) Concerning the requirement to state the "Duration of the AIF", this should be "(if applicable)", on the basis that certain AIFs may be "evergreen". For AIFs which do have a fixed term, please note that it may not be possible to specify a precise date since the term of the AIF may be expressed as being a number of months or years from a particular event.

(c) Concerning the requirement to state the "AIF national identification code", this should be "(if applicable)", in case certain Member States do not issue national identification codes, particularly in view of the legal form of the undertaking, or the national identification code is not available at the time of submission of the marketing notification.

In addition, with respect to the second table within Part 2, Section 2, of the cross-border management notification letter template, as noted in the response to Question 2 above, the fields "Home Member State of the master AIF (if different)" and "Home Member State of the AIFM (if different)" assume that the master AIF/AIFM will be EU domiciled, which may not be the case for AIFs which are not marketed pursuant to Articles 31 or 32 AIFMD.

COST-BENEFIT ANALYSIS

Question 14 - What is the anticipated impact from the introduction of the proposed ITS and RTS? Do you expect that the currently used practices, in particular as regards the content of the information provided to NCAs and the models used to notify cross-border marketing or the provision of activities in a host Member State, would need to be changed?

Invest Europe response:

A number of Member States have already established their own template management and marketing notification letters, and so existing practice would need to change. However, the anticipated impact from the introduction of the ITS and RTS is necessarily expected to force managers to devote time and effort to comply with creating new templates (in particular from an IT perspective) and will therefore naturally lead to increased costs, which may be passed on to the end customer. Nonetheless, such costs should not be more significant for the private equity/venture capital industry than it is usually the case with those reviews, assuming at least that the feedback set out above is incorporated (in particular, any replication of information should be as far as possible avoided).

Question 15 - What would be the additional costs and benefits of the proposed ITS and RTS? Please provide quantitative figures, where available, in particular in relation to costs of compliance.

Invest Europe response:

We do not have sufficient granular data from our members to provide a meaningful answer to this question.

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.

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