

26 June 2020

INREV response to ESMA consultation on draft implementing technical standards under the regulation on cross-border distribution of funds

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?

INREV agrees that NCAs should publish and maintain, on their websites, up-to-date and complete information on the applicable national laws, regulations and administrative provisions governing marketing requirements for AIFs and UCITS, and the summaries thereof in, as a minimum, a language customary in the sphere of international finance. 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.

This information will help ensure transparency on the legal and regulatory framework applicable in each Member State as regard the conditions for marketing UCITS and AIFs. The publication of marketing requirements on NCAs' websites will help fund managers in their decision-making to engage in marketing activities in host Member States and will enhance investor protection by making information on these marketing requirements more easily accessible.

A general disclaimer which refers to a non-exhaustive list of relevant bodies of law is not objectionable. However, in order to be up-to-date and complete, both the information specifically applicable to marketing requirements for AIFs and UCITS funds and the list of other bodies of law potentially applicable should specifically be required to be reviewed on a regular, for example quarterly, basis to ensure they are current. In addition, the list of other bodies of law potentially applicable should include links to where information can be found in a language customary in the sphere of international finance.

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.

INREV agrees that the format of the publication should be flexible and should focus on highlighting the requirements applicable to each type of AIF and UCITS funds rather than focusing on the format of the publication (e.g. text or table). These requirements should be clearly stated and should include practical steps. ESMA could collect the information currently available from different Member States' websites or elsewhere, such as documents distributed on request, to determine best practice and base its requirements on these examples.

A general format that only requires NCAs to clearly identify the requirements applicable to the marketing of UCITS and those applicable to the marketing of each type of AIF existing under national

law, on both a domestic and a cross-border basis, should be sufficient, so long as the specific points we raise above and in Questions 3, 4 and 7 are adequately addressed.

Each NCA should set out in detail any additional requirements that apply to the pre-marketing of an UCITS or an AIF in their jurisdiction. The NCA should also confirm the point at which the Cross Border Distribution Directive is in force in its jurisdiction and that, as of 2 August 2021, there are no additional requirements to pre-marketing an UCITS or an AIF in the jurisdiction beyond those requirements set out in the Cross Border Marketing Regulation (or, if any such requirements still exist, detail of what these requirements are and how to comply).

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.

INREV agrees with the general approach taken regarding the main characteristics of the summary of marketing requirements that NCAs should be required to publish on their websites. However, following on the point raised in response to Question 2, we believe that the requirements should be clearly stated and should include practical steps and links to further information, e.g.:

- when payment must be made,
- to whom it must be made, including clear payment details giving account detail information
- the acceptable form(s) of confirmation of payment
- events that trigger a payment obligation, for example a change of AIFM
- a non-exhaustive list of events considered to be a 'material change' requiring notification
- required document naming conventions
- whether notification can be achieved by the fund manager filing a single form or whether separate forms for each Member State where notification authority is sought, etc.

In fact, given the wide divergence across the EU member States and the excessive burden created, we believe that ESMA should consider adopting standard requirements regarding these last two points regarding naming conventions and notification applications.

An area where additional information and regulatory requirements should also be included relates to each Member State's rules regarding the types of investors that can invest in AIFs. Some jurisdictions allow a wider group of investors (who are not professional investors) to invest in AIFs if they comply with certain rules, for example, if individual investors are certified as high net worth individuals or are sophisticated investors. It would be helpful if the NCAs could publish on their websites (where applicable) a summary of the rules and procedures for allowing a wider group of investors to invest in AIFs.

Regarding whether a text or table is used, the table can be useful if it sets out information on minimal 'core' requirements with 'other' or 'additional' information available either through a link or additional text. Text is useful if it structured in a way that presents the requirements and other information clearly. A Question and Answer format for text narrative could be very helpful, for example. In either case, there should be sufficient practical detail available to clearly inform the reader. All information should also be available in a language customary in the sphere of international finance, which for now means in English.

Whether a table or a Q&A format is used, some practical issues that would be helpful to provide information on include specific regulations regarding what constitutes pre-marketing or marketing activity, and specifically regulations regarding:

- sending a teaser/ presentation to investors
- sending offer documents to investors
- meeting with investors
- investors signing subscription documents
- fund manager chaperoning restrictions

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?

INREV agrees that the provisions of Article 10(1), which make no distinction between cross-border marketing and cross-border management, 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 inward or outward. In Member States where no fees or charges are levied in relation to certain activities, e.g. inward cross-border marketing, NCAs should make it clear that there are no other fees or charges other than those listed on their websites.

We also agree that whether a Member State publishes a list of regulatory fees and charges or the calculation methodologies thereof, where such methodologies exist, the information made available should ensure that stakeholders can easily determine the amount of the fees and charges that would be levied for their cross-border activities in the concerned Member State by referring to the NCA's website.

As mentioned in response to Question 3, practical steps and links to further information such as when payment must be made and to whom it must be made and links to further information should be included. In addition, a statement should be required that the list of fees or methodology shown represents an exhaustive list of applicable fees and charges and that no other fees or charges other than those listed on their websites apply.

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?

INREV agrees that the publication to be made by NCAs under the ITS should be made in the form of a table that sets out at least information on minimal 'core' requirements with 'other' or 'additional' information available through either a link or additional text, as noted in response to Question 3.

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?

INREV agrees that the publication to be made by NCAs under the ITS should be made in the form of a table that sets out at least information on minimal 'core' requirements with 'other' or 'additional' information available either through a link or additional text, as noted in response to Questions 3 and 5. Therefore we also agree that NCAs should 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 for any reason, but especially if a table would risk giving incomplete or misleading information.

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?

As mentioned in response to Q3, NCAs should also be required to state what sort of document or receipt constitutes acceptable evidence of payment. In addition, an explicit statement should be included in the website that when passport authority is withdrawn, no more fees and charges are due and payable. In connection with this point, the NCA's website should state clearly whether passport authority for part of a year entitles the fund manager to a partial refund of annual fees paid.

In addition, a statement regarding whether closed end funds' marketing authority can be withdrawn after the fund's final close and whether its obligation to pay further marketing fees therefore ends, should also be included in the NCA's website.

Finally, NCAs should be required to show a dedicated email address and telephone contact details where further information or answers to questions can be obtained. Any voicemail message prompting the caller to leave a message or giving further information should be in a language customary in the sphere of international finance and the individuals or unit members responsible for answering questions should be able to speak a language customary in the sphere of international finance.

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?

The information to be contained in the central database listing AIFs marketed on a cross-border basis and indicating the Member States in which those funds are able to be marketed under passport authority would be very helpful for market participants, including investors looking to invest in funds or fund managers considering whether to develop funds for investors in certain markets. As a result, retaining historic information, including funds no longer being marketed and noting when marketing authority was withdrawn would be helpful.