
30 September 2016

Executive Summary

INREV is the European Association for Investors in Non-Listed Real Estate Vehicles. We provide guidance, research and information related to the development and harmonisation of professional standards, reporting guidelines and corporate governance within the non-listed property funds industry across Europe.

INREV currently has 388 members. Our member base includes institutional investors from around the globe including pension funds, insurance companies and sovereign wealth funds, as well as investment banks, fund managers, fund of funds managers and advisors representing all facets of investing into non-listed real estate vehicles in Europe.

INREV welcomes the opportunity to comment on the Commission's public consultation on the main barriers to the cross-border distribution of investment funds across the EU. Although our comments are focused primarily of barriers to the cross-border distribution of AIFs, rather than UCITS or other funds, we hope again to provide a meaningful contribution to your work to support the development of an effective regulatory framework and remain available should you have any specific questions about the non-listed fund industry.

While real estate makes a vitally important contribution to economic stimulation, growth and job creation in Europe, the barriers we note in our response limit our ability to contribute in this way as effectively as would otherwise be possible. We therefore urge the Commission to take steps to address them without delay.

We would like to note further that one of the key barriers to cross-border marketing that we highlight in this submission relates to the manner in which different Member States impose fees on AIFMs and AIFs. However, we do question whether the AIFM Directive allows the imposition of these fees at all. Article 32(1) of the AIFMD provides that as soon as the conditions laid down in the Article are met, an EU AIFM may begin marketing. The conditions laid down contain no reference to the imposition of additional fees or requirements by the host Member State. We therefore consider that following the wording and intention of the AIFM Directive, Member States are not permitted to impose additional fees or requirements on AIFMs which are seeking to market in host Member States using the AIFMD passport. Moreover, we note the distinction between the UCITS Directive, which specifically envisages that national regulators may charge notification fees, and the AIFM Directive which contains no such provisions.

We also wish to note that the nature of the passport under the AIFM Directive is a manager passport rather than a fund passport as envisaged under the UCITS Directive. We consider that any requirements which are placed on an EU AIFM which is seeking to market its EU AIFs under the marketing passport, including fees, should therefore be limited to requirements which relate to the AIFM and not to each individual AIF which the EU AIFM is seeking to market.

2. General Overview

2.2 In your experience, which of the following issues are the major regulatory and tax barriers to the cross-border distribution of funds in the EU? For the issues you consider to be major barriers, please rank them in order of importance (1 – most important, 6 – relatively less important)

	1	2	3	4	5	6	Not an issue
Different definitions across the EU of what marketing is	X						
Marketing requirements imposed by host Member States		X					
Regulatory fees imposed by host Member States			X				
Administrative arrangements imposed by host Member States				X			
Lack of efficiency of notification process							X
Difficult/cumbersome refund procedures for claiming relief from withholding taxes on distributions by the UCITS, AIFs, ELTIF, EuVECA or EuSEF							
Higher taxation of investment funds located elsewhere in the EU/EEA than of domestic funds							
Differences between the tax treatment of domestic and foreign fund managers as regards withholding tax/income reporting responsibilities and opportunities on income distributed by UCITS, AIF, ELTIF, EuVECA or EuSEF							
Differences between Member States in tax reporting							
Other							

3. Marketing requirements

3.1b - Are you aware of member state interpretations of marketing that you consider to go unreasonably beyond the definition of marketing in AIFMD? Please explain.

A number of EU Member States define marketing so broadly that no activities that are normally considered “pre-marketing” are allowed. Although France recently provided helpful clarification of what activities are considered pre-marketing (“*pre-commercialisation*”), countries such as Spain and Italy, for example, do not allow discussions of general fund strategy with investors before a marketing passport is in hand, even though the fund may not have even been established yet. This interpretation is not used in other EU countries and is commercially unreasonable.

3.1 c - Are you aware of any of the practices described above having had a material impact upon the cross-border distribution of investment funds? Please explain.

This practice of not allowing “pre-marketing”, or discussions with investors prior to the launch of a fund, has a material impact on the cross-border distribution of real estate investment funds. It makes it very difficult to do a broad cross-border launch of a fund.

3.2 - Which of the following, if any, is a particular burden which impedes the use of the marketing passport?

	Yes	No
Different interpretations across Member States of what constitutes marketing?	X	
Different methods across Member States for complying with marketing requirements (e.g. different procedures)?	X	
Different interpretations across Member States of what constitutes a retail or professional investors?		X
Additional requirements on marketing communications imposed by host Member States?		X
Translation requirements imposed by host Member States?		X
Other domestic requirements	X	

Please specify what other domestic requirements are a particular burden which impedes the use of the marketing passport:

Spain requires the appointment of a local agent. This requirement seems to have been taken from UCITS but is not in AIFMD. Not only is it an additional expense, but the time required to enter into an arrangement with a local Spanish agent can be quite long.

Many EU Member States impose unreasonable fees which impedes the use of the marketing passport. Some Member States impose no fees at all, and some impose reasonable fees, but in other cases, the fees appear to be arbitrary, based on intransparent methodologies and/or subject to automatic annual increases unrelated to costs. To give a few examples, Italy imposes a fee of EUR 4,000 per fund, which can be extremely expensive for an AIFM marketing a number of funds. Malta imposes a fee of EUR 2,500 per fund each year, which is also prohibitively expensive given the small number of potential investors there. Austria imposes an initial fee of EUR 1,100 per fund and an annual fee of EUR 600 per

fund, with additional fees charges in both cases for each sub-fund. Croatia charges an initial fee of EUR 2,900 per manager as an annual fee of EUR 1,800 per fund.

We see no good policy reason why managers should be prevented from approaching professional investors in a jurisdiction to gauge interest in a possible product which has not yet been established and its terms remain under negotiation. Investors should be sufficiently protected if registration requirements are complied with prior to investors receiving final documentation which is capable of being subscribed to.

Finally, some countries seem to impose a requirement that local legal representatives be used. While this requirement may not be explicitly stated in local regulations, unreasonable delays are often incurred when attempting to use non-local legal representatives when exercising passporting authority.

3.2a – Please explain your answer to question 3.2:

The interpretations and practices noted as impeding the use of passport authority, together result in many fund managers marketing their funds only in larger Member States with a significant investor base. Smaller Member States are therefore less able to access a diverse pool of suitable investment products that could be a good liability matching investment or well suited to their risk-return preferences.

However Member States that do not charge fees for exercising passport authority avoid this consequence. Examples of these member States include Bulgaria, Cyprus, Czech Republic, Ireland, Greece, The Netherlands, Norway and Poland.

3.3 Have you seen any examples of Member States applying stricter marketing requirements for funds marketed cross-border into their domestic market than funds marketed by managers based in that Member State?

- Yes
- No
- Don't know / no opinion / no relevant

3.4 Are domestic rules in each Member State on marketing requirements (including marketing communications) easily available and understandable?

- Yes
- No
- Don't know / no opinion / no relevant

3.4a- If your answer to question 3.4 is no, please specify in which Member State(s) the rules are not easily available and understandable:

Germany, Italy and Spain

3.4b - If your answer to question 3.4 is no, please provide details and explain why the rules are not easily available and understandable in this/these Member State(s):

When it is available, the guidance is sometimes quite vague and open to interpretation. For example, Germany allows discussions with investors if a fund is "still open to negotiation" but it isn't clear whether this means general fund terms or issues such as fees, which can be tailored for each investor. In Italy, the Bank of Italy guidance on what activities constitute marketing is so unclear as to offer no real clarity on many issues in practice.

In some EU Member States, guidance is not available in writing. Direct contact with the regulators can provide the clarity required, but then there's no way to know whether this guidance is arbitrary, applied

consistently to other fund managers or likely to change the next time the same question is asked, particularly if a different person in the same office is contacted. In Spain for example, whether recurring annual fees are charged is not easily found in the written regulations and appears to be determined on an ad hoc basis.

3.15 Do you consider that rules on marketing communications should be more closely aligned in the EU?

- Yes
- No
- Don't know / no opinion / no relevant

3.15a - Please explain your answer to question 3.15 – and if appropriate, to what extent do you think they should be harmonised:

For our industry, this questions is related almost entirely to the different interpretations of what activities constitute marketing.

3.17 - What role do you consider that ESMA – vis-a-vis national competent authorities – should play in relation to the supervision and the monitoring of marketing communications and in the harmonisation of marketing requirements? If you consider both should have responsibilities, please set out what these should be.

ESMA should have more power to issue guidance on what the AIFM regulations should be and to monitor their implementation. National supervisors should then be charged with implementing, but not freely interpreting, the regulations.

5. Regulatory fees

5.1 Does the existence and level of regulatory fees imposed by host Member States materially affect your distribution strategy?

- Yes
- No
- Don't know / no opinion / no relevant

The fact that many small Member States charge high fees per AIF and that an AIFM with a number of funds can end up with significant fees being charged to market their funds limits the number of Member States in which they choose to market. In general they choose to market only in Member States with relatively large investor bases.

5.2 - In your experience, do any Member States charge higher regulatory fees to the funds domiciled in other EU Members States marketed in their Member State compare to domestic funds?

- Yes
- No
- Don't know / no opinion / no relevant

5.2a - Please explain your answers to question 5.2 and provide evidence:

Even in Member States where it appears that passporting fees are set at a similar level to domestic fees, this practice seems to be driven by a desire to raise revenue and the fees are not otherwise transparently calculated or seemingly related to the cost of additional supervision.

Furthermore, this practice seems driven by the desire to prevent local managers from seeking authorisation in another, lower fee, Member State and then operating in the former domicile Member State under a low-fee passporting notification. This undermines the value of passporting generally as it simply multiplies the domestic fees for every Member State in which the passporting authority is exercised.

5.3 - Across the EU, do the relative levels of fee charged reflect the potential returns from marketing in each host Member State?

- Yes
- No
- Don't know / no opinion / no relevant

5.8 - Where ongoing fees are charged, are they related to use of the passport?

- Yes
- No
- Don't know / no opinion / no relevant

5.9 - Do differing national levels of, and bases for, regulatory fees hinder the development of the cross-border distribution of funds?

- Yes
- No
- Don't know / no opinion / no relevant

5.9a - Please explain your answer to question 5.9

Our view that the fees charged are a barrier to the cross-border marketing of funds relates more to the absolute level of the fees rather than the differing levels or the basis on which they're charged. This is particularly true for initial fees, which are charged before the fund manager is able to determine the commercial interest in its funds.

5.9b - On who are regulatory fees are charged: managers or funds? Please describe if there are different practices across the EU:

Where Member States charge fees (not all do), they are typically based on the number of funds and sometimes even the number of sub-funds.

6. Administrative arrangements

6.1 - What are the main barriers to cross-border marketing in relation to administrative arrangements and obligations in Member States? Please provide tangible examples of where you consider these to be excessive:

As noted earlier, Spain requires the appointment of a local agent.

In addition, Luxembourg has very strict requirements regarding the protocol for naming documents submitted in connection with the electronic filing of notification requests. If not followed in minute detail, the authorisation and notification and therefore cross-border marketing can be unreasonably delayed.

6.2 - Do you consider requirements imposed by host Member States, in relation to administrative arrangements, to be stricter for foreign EU funds than for domestic funds?

- Yes
- No
- Don't know / no opinion / no relevant

7. Direct and online distribution of funds

7.1 - What are the main issues that specifically hinder the direct distribution of funds by asset managers?

	Yes	No
Marketing requirements	X	
Administrative arrangements		
Regulatory fees	X	
Tax rules		
Income reporting requirements		
Lack of resources		
others		

7.3 - Are there aspects of the current European rules on marketing, administrative arrangements, notifications, regulatory fees and other aspects (such as know your customer requirements) that hinder the development of cross-border digital distribution of funds beyond those described in earlier sections?

- Yes
- No
- Don't know / no opinion / no relevant

8. Notification process

8.4 - Do you have difficulties with the AIFMD notification process?

- Yes
- No
- Don't know / no opinion / no relevant

8.5 - Have you experienced unjustified delay in the notification process before being able to market your AIFs in another Member State?

- Yes

- X No
- o Don't know / no opinion / no relevant

8.6 - What should be improved in order to boost the development of cross-border distribution of funds across the EU?

One final suggestion would be to provide more clarity regarding what contact with investors, if any, can be had during the 20-day waiting period following the notification of a material change. For example, whether activities under the PPM are allowed.

9. Taxation

9.1 - Have you experienced any difficulties whereby tax rules across Member States impair the cross-border distribution and take-up of your UCITS or AIF or ELTIF or EuVECA or EuSEF?

	Yes	No
UCITS		
AIF	X	
ELTIF		
EuVECA		
EuSEF		

9.1a - Please describe the difficulties, including whether they relate to discrimination against UCITS or AIF (including ELTIF, EuVECA or EuSEF) sold on a cross-border, and provide examples. Please cite the relevant provisions of the legislation concerned.

In certain countries, including Germany and The Netherlands, a different tax treatment of open ended and closed ended, which is also based based on certain asset thresholds, applies. Cross border distribution of EU funds in Germany is only successful if they adhere to these unique requirements. While these requirements are manageable so long as more countries do not follow a similar path, if every EU country comes up with its own specific set of rules under which preferential tax treatment is granted, cross-border marketing will not be successful.

In addition, we would like to point out that, as a general tax concern, substantial tax and tax treaty access issues for AIFs are expected to arise if the proposed OECD BEPS Action Plan 6 (on the granting of treaty benefits with respect to the income of collective investment vehicles) is implemented by OECD member states without appropriate safeguards to ensure the continued eligibility of tax treaty benefits to AIFs and AIF structures. INREV has expressed to the OECD its belief that unrestricted access to tax treaties for real estate AIFs (Non-CIVs) and their (controlled) special purpose companies is justified, in order to achieve tax neutrality consistent with the OECD 2010 CIV report.

INREV has expressed its concerns recently in a 22 April 2016 response to OECD's "Public Discussion Draft Treaty Entitlement of Non-CIV Funds of 24 March 2016". This response, together with similar responses of industry partners, is available under <https://www.oecd.org/ctp/treaties/public-comments-received-discussion-draft-treaty-entitlement-of-non-CIV-funds.pdf>.

In light of the tax treaty access work currently undertaken by the OECD, and to ensure a level playing field, INREV recommends the European Commission co-ordinate efforts with the OECD with respect to

the tax treaty access of AIFs and AIF structures, especially in those cases where the loss of tax treaty benefits results in a distribution barrier in the form of increased withholding and other taxes.

10. Other questions and additional information

10.1 - Are there any other comments or other evidence you wish to provide which you consider would be helpful in informing work to eliminate barriers to the cross-border distribution of UCITS or AIFs (including ELTIF, EuVECA and EuSEF)?

We would like to note further that one of the key barriers to cross-border marketing that we highlight in this submission relates to the manner in which different Member States impose fees on AIFMs and AIFs. However, we do question whether the AIFM Directive allows the imposition of these fees at all. Article 32(1) of the AIFMD provides that as soon as the conditions laid down in the Article are met, an EU AIFM may begin marketing. The conditions laid down contain no reference to the imposition of additional fees or requirements by the host Member State. We therefore consider that following the wording and intention of the AIFM Directive, Member States are not permitted to impose additional fees or requirements on AIFMs which are seeking to market in host Member States using the AIFMD passport. Moreover, we note the distinction between the UCITS Directive, which specifically envisages that national regulators may charge notification fees, and the AIFM Directive which contains no such provisions.

We also wish to note that the nature of the passport under the AIFM Directive is a manager passport rather than a fund passport as envisaged under the UCITS Directive, although the AIFM does have to notify the passport on an AIF by AIF basis. We consider that any requirements which are placed on an EU AIFM which is seeking to market its EU AIFs under the marketing passport, including fees, should therefore be limited to requirements which relate to the AIFM and not to each individual AIF which the EU AIFM is seeking to market.