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European Fund and Asset Management Association

EC Proposal on facilitating cross-border distribution of collective investment funds

EFAMA Position Paper

Executive Summary

The European Fund and Asset Management Association (EFAMA)[1] fully supports the European Commission's intended objective of removing existing barriers to the cross-border distribution of collective investment funds, thereby allowing European households and investors to take full advantage of the EU Single Market by choosing funds also outside of their home Member State.

However, the European Commission's recent proposal for a Directive and Regulation on facilitating cross-border distribution of collective investment funds falls short of its stated objective, at least in part. In particular, with regard to the proposed Directive, we highlight two key aspects of the proposal serving to make the fruition of the UCITS/AIFMD passport regime more difficult:

i. **The narrow definition of pre-marketing for AIFs**, along with its related conditions, as one likely to curb the existing flexibility for management companies when sounding the interest of prospective investors for both existing AIFs and potential investment ideas on a domestic and cross-border basis; and

ii. **The restrictive conditions governing the de-notification of UCITS/AIFs** for the consequent cessation of marketing their units/shares in EU host jurisdictions, likely to hinder management companies to enter a host jurisdiction from the beginning.

Consequently, regarding the first point, we call for an expansion of the pre-marketing conditions for AIFs to also include existing AIFs, as well as references thereto and seeding capital commitments in an AIF's pre-launch phase. Moreover, the pre-marketing regime should necessarily allow for the preliminary exchange of non-final documents between an AIFM and one or more prospective investors, while also barring the opportunity to circumvent notification requirements where the pre-marketing proves to be successful. We would, moreover, invite ESMA to consider practical steps in view of harmonising pre-marketing practices for UCITS funds by means of "Level 3" guidance with a view to fostering greater regulatory convergence amongst Member States.

With regard to the de-notification conditions, we call for the elimination of the numerical thresholds prescribing conditions for the de-notification of funds from a given host jurisdiction, as their logic challenges management companies' business decisions and risks obtaining the opposite of the intended effect, i.e. discourage cross-border distribution in the first place.

Apart from these two key aspects, our further preliminary remarks are as follows:

[1] EFAMA is the representative association for the European investment management industry. EFAMA represents through its 28 member associations and 62 corporate members close to EUR 23 trillion in assets under management of which EUR 14.1 trillion managed by 58,400 investment funds at end 2016. Just over 30,600 of these funds were UCITS (Undertakings for Collective Investments in Transferable Securities) funds, with the remaining 27,800 funds composed of AIFs (Alternative Investment Funds). For more information about EFAMA, please visit www.efama.org.

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- We fully support the removal of requirements to appoint physical local agents in host jurisdictions, as per the proposed amendments to both UCITS/AIFMD frameworks;
- With respect to the common marketing and communication requirements in the proposed Regulation, we believe these confuse important distinctions between the nature of the two frameworks' respective investment audiences, i.e. retail for UCITS and predominantly professional for the AIFMD;
- We welcome the provisions of the Regulation which allow ESMA to achieve greater transparency for all market players by (i) collecting information on fees and charges from the NCAs, (ii) developing draft regulatory technical standards to specify the information on these costs to be received from NCAs, and (iii) maintaining a related interactive database and tool.

Finally, we wish to reiterate that better outcomes could have been achieved by avoiding changes to the "Level 1" UCITS and AIFM Directives' texts, in favour of more technical guidance from ESMA in the exercise of its mandate to foster greater regulatory convergence amongst Member States. EFAMA is concerned that the overly complicated and impractical distribution rules included in sections of the Commission's proposals would exact a heavy toll in terms of reduced fund choice for end-investors and less competition amongst European fund providers.

PROPOSAL FOR A DIRECTIVE

I. Pre-marketing[2]

There are important risks that, in an effort to exhaustively qualify all market practices, the narrow legal definition of pre-marketing and related conditions could effectively exclude both existing and future ones, thereby acting as a disincentive to the marketing of funds across different EU jurisdictions. Since the definition would also apply to a purely domestic situation, the proposed provisions would also limit the existing flexibility to discuss investment strategies with professional investors regardless of their cross-border relevance. In their supervisory practice, several NCAs have opted for guidelines bearing both positive and negative examples instead of rigid legal definitions. EFAMA would therefore continue to encourage non-legislative means to provide further legal clarity and consistency, while at the same time maintain the needed flexibility for asset management companies when sounding the interest of prospective investors. In this regard, EFAMA continues to support defining pre-marketing practices via ESMA guidance, as a more appropriate and effective policy tool to realise regulatory convergence by building on existing national best practices. The outcome would naturally also allow AIFMs to better anticipate which practices are to be regarded as pre-marketing or marketing in host jurisdictions. In addition, EFAMA suggests a harmonisation of pre-marketing practices for UCITS funds via ESMA guidance, as an appropriate way to resolve existing divergences in EU regulators' national practices and thus facilitate UCITS cross-border distribution.

[2] In the Commission's impact assessment document, the problem driver is allegedly the fact that there are at least six Member States which have their respective NCAs check and approve all marketing materials *ex-ante*. As not all Member States have these in place, the objective of the proposal is to harmonise. Hence, Article 30a(1) letter d) amending AIFMD considers draft prospectuses, constitutional documents of a non-established AIF as marketing and no longer in the discretionary remit of what has until now been "non-marketing". The Commission has also justified this rationale with the need to avoid that such preliminary exchanges between asset management companies and their prospective institutional clients be qualified as reverse solicitation, as per Recital (11) of the proposed Directive.

While we appreciate the Commission's aim to find a common understanding for pre-marketing throughout the EU, we believe that the legal definition of the proposed Directive and the related conditions are unlikely to achieve the objective of a convergence between regulatory approaches and practices in relation to pre-marketing activities. Rather, it will substantially limit managers' ability to informally explore institutional investors' appetite for new AIFs. Furthermore, by excluding established AIFs, the proposal is precluding an important opportunity for AIFs to achieve economies of scale by pooling more investors' savings – and thus more assets under management (AuM) - from across EU borders. The likely outcome will be a continued proliferation of small funds at a domestic level, to the detriment of lower costs for investors and greater competitiveness of the European industry, at odds with the continued integration of the Single Market through CMU.

I.I The legal definition of pre-marketing

The legal definition of pre-marketing - as per Article 2 of the proposed Directive adding the new point (aea) to Article 4(1) of the AIFMD - is too narrowly drafted, preventing those preliminary exchanges and activities that are necessary for a management company to sound whether there will be sufficient demand in both the home market as well as a new host market for an AIF. We believe this definition should be expanded to also allow pre-marketing practices in EU (host) jurisdictions for those funds already established in other (home) Member States and not yet benefitting from the EU marketing passport in the former[3]. This would improve conditions for the cross-border distribution of existing EU AIFs, alongside the potential for new, "non-established" AIF product launches.

In addition, we believe that referencing existing AIFs is relevant in discussions with an AIFM's local distribution partners, especially where the former cannot rely on an intra-group "captive" distribution capacity and will need to demonstrate its investment capabilities by referencing existing solutions local investors may be seeking. In this regard, references to existing AIFs authorised and/or marketed in other jurisdictions are therefore of paramount importance for an AIFM to present a more convincing proposition to partner or new distributors.

EFAMA is also aware of the European Commission's concerns related to the potential circumvention of the marketing regime through the reverse solicitation of existing AIFs via the means of pre-marketing with respect to the same AIFs. We believe there is no substance behind such concerns and a successful pre-marketing campaign should therefore not be deemed as the outcome of reverse solicitation, but only lead to a formal notification under Article 32 of the AIFMD and consequent activation of the marketing passport.

I.II The importance of preliminary documentation

Concerning the types of documentation that can be offered during the pre-marketing phase and under the terms of the proposal – specifically, in the new Article 30a(1) letter (d) of the AIFMD - all practices that involve preliminary exchanges with prospective clients, involving draft prospectuses, draft constitutional documents, draft subscription forms, etc. would count as marketing materials. As such, they would fall outside the scope of the definition of pre-marketing introduced by the relevant amendments to Article 4(1) of the AIFMD. *De facto*, the proposed amendments would have the following material implications:

i. They will significantly anticipate the period from which "marketing" begins by carrying forward the notification dates for AIFs to be authorised and registered with local NCAs. Whereas

[3] We note that for new funds looking to be established in their home jurisdiction for the first time, the pre-marketing regime would logically be restricted to these new funds only.

current market practices consider "marketing" to occur only once the relevant documents are finalised and only after the related permissions are obtained from local NCAs, the wording of the new Article 30a activates the marketing passport at an earlier stage, when an asset manager and its prospective institutional client are still negotiating essential elements of a future investment agreement (e.g. a vehicle's legal structure[4], investment strategy, fees, a client's rights and participation in investor committees, etc.). We would therefore begin by questioning the Commission's approach precisely from the viewpoint of the prospective investor and future shareholder of an AIF with an interest in agreeing on the final investment structure and strategies with the management company. The proposed narrow definition and conditions of pre-marketing imply that this is not possible which we believe is neither fair, nor practical, nor transparent, to prospective investors;

ii. The proposed definition and conditions for pre-marketing would as a result imply a significant increase in the related administrative burden, accompanied by additional notification costs for AIFMs, as these would be bound to not only transmit a notification file to their home NCA (as per Article 32 of the AIFMD), but also a notice of every material iteration of the preliminary documents exchanged between the asset manager and the prospective institutional client, as discussions around the details of an investment agreement develop. As each material iteration would have to be notified according to Articles 31(4) and 32(7) of the AIFMD once the first marketing notification has been filed, multiple filings will be required for the launch of any single EU AIF. Regulatory fees will be charged for funds which may also ultimately never come to fruition, along with the additional administrative and legal costs that would be incurred by an AIFM in making the related multiple filings, thereby implicitly qualifying as another barrier to cross-border distribution and in direct contradiction to the broader objectives of the proposed legislation;

iii. The conditions that must be met in order to fall within the "safe-harbour" of pre-marketing do not seem to reflect what currently occurs commercially. The wording of the new Article 30a – specifically, letter c) thereof – would complicate AIF seeding arrangements between an AIFM and external institutional investors. As these investors will "commit" their funds to an AIF during its pre-launch phase and prior to any authorisation, the narrow definition and conditions for pre-marketing will inevitably exclude the seeding institutions and thereby place the formal AIF marketing regime at odds with the underlying intent of fund seeding practices. In this regard, the proposal also introduces a discrimination between those (potentially smaller) AIFMs which are not part of a larger financial group *versus* those that are, much to the advantage of the latter and with a negative effect on competition[5];

iv. Finally, from the perspective of local NCAs, the need to receive a constant flux of information via continuous notifications – as per (ii) above – is questionable in terms of relevance, placing unnecessary demands on the limited resources of NCAs. We would see no purpose for authorities to be vetting all intermediary stages preceding the final launch of a fund.

In sum, to avoid contradicting the objective of further reducing regulatory barriers (as per the proposal's Explanatory Memorandum), the relevant provisions of the new Article 30a of the AIFMD should be amended to exclude the conditions of paragraph 1, letters a), b) and c), while excluding from

[4] For instance, this could be a partnership or take another form, including master-feeder structures, etc.
[5] In this respect, please refer to the general exemption of Article 3(1) of the AIFMD, whereby the directive does not apply to AIFMs insofar as they manage one or more AIFs whose only investors are the AIFM, or the parent undertakings, or the subsidiaries of the AIFM, or other subsidiaries of those parent undertakings.

the notion of pre-marketing only those offering/subscription documents in their final form. Prior exchanges of prospectuses, constitutional documents of established or non-established AIFs, drafts of offering documents or subscription forms, or any non-binding agreement for the provision of capital from seeding investors for the establishment of an AIF on a commercially viable basis, shall be considered to meet the definition of pre-marketing.

It is therefore essential for the notion and conditions of pre-marketing to be broadened to allow a series of preliminary exchanges between asset managers and prospective institutional clients – whether individual or as part of a larger group - to occur freely, in a non-binding manner, and according to these parties' mutually agreed timetables. This would apply *a fortiori* to prospective investors of EUSEF and EUVECA structures, which leads us to also object to the extension of essentially the same pre-marketing definition to these two regulations[6].

II. De-notification of marketing units/shares of UCITS & AIFs

As a preliminary observation, EFAMA would note that the term "discontinuation" in the proposed text would lend itself to varying interpretations by the NCAs. Alternatively, our preference would be for the co-Legislators to replace it with "de-notification", thus creating a clearer parallel with the Directives' existing notification requirements when asset management companies wish to avail themselves of the cross-border marketing passport. Important is also to clarify that the envisaged de-notification regime should not apply in the context of fund mergers, specifically with regard to investors in the merging fund.

II.I Numerical thresholds at odds with intended policy objective[7]

The decision to de-notify marketing of units/shares of an investment fund in a given jurisdiction is and should fundamentally remain a commercial decision of an asset management company, based on the popularity of a given strategy and its effectiveness in meeting end-investors' needs. Several may be the reasons as to why an asset management company may wish to withdraw from a specific host market, although these should be left to the discretion of the asset management company.

Ongoing disclosures to investors and the general principles placed on the management company to carry out its fiduciary duties in the best interest of the former should not cease merely because marketing activities in a given jurisdiction have been withdrawn. Therefore, foreseeing a prescriptive regime – as per Article 93a for UCITS and Article 32a for AIFs of the proposed Directive - for how and when a management company should decide to cease the marketing of a fund, as one built on one-size-fit-all quantitative thresholds, seems onerous, unnecessary and disruptive, not solely from a

[6] In this regard, please refer to the related definition of added under Article 3, point (o), accompanied by a new Article 4a, for both of the relevant Regulations, i.e. Regulation (EU) No. 345/2013 (EUVECA) and Regulation (EU) No. 346/2013 (EUSEF).

[7] The European Commission has recently questioned whether an asset management company may have an incentive to resort to reverse solicitation as a mean to gather new investors into a fund after having de-notified it from marketing in one or more host jurisdictions. We confirm there would be no business rationale behind such reasoning in light of the fact that (i) a de-notified product is no longer an attractive investment proposition for investors, and (ii) that any rare reversely-solicited offer could raise doubts as to a manager's adherence to its fiduciary duties. Finally, one must consider that especially for UCITS, sales to end-investors are for the most part intermediated by distributors who act as nominee account holders. Consequently, the asset management company does not know the identity of the end-investor, enough to then engage into widespread direct sales from reverse solicitation. These, *inter alia*, from an economic cost and commercial stand-point, would also be disadvantageous for the asset management company.

company's business strategy perspective, but also in terms of narrowing fund diversity and choice to end-investors. Indeed, if de-notification cannot be decided independently by an asset management company but is instead based on *ad hoc* and arbitrary thresholds it cannot influence, likely is that less funds will be notified intra-EU as a result of greater entrepreneurial risks[8].

Where the main objectives are to safeguard the rights of end-investors and to avoid any information disadvantage, these could be achieved by ensuring, as a first step, that prior information of the decision to de-notify the marketing of a specific fund is sent to its distributors and end-investors (where known), indicating a date from which the de-notification process becomes effective, i.e. when marketing will cease, as well as options available. As a second step and once the de-notification process has commenced, the following options could be considered for existing investors, to be exercised over a given time horizon. Investors could be offered to either:

i. Exit the fund free of charge within the specified time horizon[9];

ii. Convert their holdings into units/shares of other funds with similar investment policies and managed by the same management company or by any other company with which the management company is linked[10]; or

iii. Remain invested in the de-notified fund. In this latter case, the reporting duties of the asset management company would remain intact, albeit the latter should no longer be obliged to provide investors with periodic disclosures in the local language, but rather in one which is customary to international finance, regardless of their professional or retail nature.

In EFAMA's view, the suggestions foreseen in the proposed Directive, both for UCITS and AIFs, are not entirely sufficient to ensure adequate investor protection. Particularly problematic are the amending conditions for UCITS management companies (new Article 93a) and AIF management companies (new Article 32a) governing the potential de-notification in the offer of their respective fund units/shares in a given host jurisdiction. Accordingly, such de-notification would be allowed only where:

(a) There are no more than 10 domiciled or registered investors in a given Member State and these collectively hold less than 1 per cent of the UCITS/AIF assets under management (AuM);

(b) A blanket offer to repurchase the interests of investors held in UCITS/AIFs, free of all charges or deductions, is publicly announced and addressed individually to all known investors over a valid 30-day business day period; and

(c) The management company's intention to de-notify the offer in a given Member State must be made publicly through a medium which is customary for the marketing of UCITS/AIFs and suitable for their respective investor profiles.

The proposed minimum threshold condition approach will be very difficult to implement and in some cases even impossible. Indeed, it is important to consider that where the marketing of fund

[8] A related issue are constraints arising from legacy stock exchange listing rules. For instance, there are UCITS management companies which in the past have chosen to list funds on national stock exchanges. As subsequent marketing in these jurisdictions has superseded the need for maintaining such listing requirements and their related costs, EFAMA would propose that de-listing rules be clarified on par with the proposed de-notification requirements under the terms of the proposal.

[9] Where the re-purchase offer period elapses, an additional opportunity could be offered for the end-investor to redeem its units/shares either directly or via intermediaries of the fund in its home jurisdiction.

[10] Please refer to Article 45 of the UCITS Directive, providing for a unit conversion offer into units of another fund in case of mergers.

units/shares occurs via a third-party distributor, or local agent, in a host jurisdiction, it may not be possible for the asset management company to provide precise information on the number of end-investors and related AuM to the host NCA. Unless investors are individually known to such distributors, local agents, etc., requiring such nominee holders to provide information would prove excessively burdensome and paradoxically act as a barrier to greater cross-border distribution of funds[11]. The proposed minimum thresholds to be inserted into both UCITS and AIFM Directives – as per the above letter a) - would therefore defeat the Commission's proposed policy objective[12].

As long as end-investors are well informed via representatives of a fund's distribution channels or more remotely via online means, a minimum remaining number of them should not be a criterion to determine whether to de-notify marketing in a specific EU host jurisdiction. We would therefore propose to delete the conditions introducing minimum thresholds – as per letter (a) of the respective new UCITS (Article 93a) and AIFMD (Article 32a) articles - and suggest to maintain, albeit with some amendments, the information requirements targeting the underlying investors under letters b) and c) in both new articles.

II.II Considering different structures in the de-notification process

EFAMA considers that the de-notification provisions should not be identical for all types of funds, as this would disregard essential differences between funds that are mass retail products and funds which are aimed at a sophisticated/professional investor base. In comparative terms, the latter is able to exercise greater discretion and contractual strength in terms of negotiating the terms of their investment *vis-à-vis* the management company. Such structures may not envisage allowing new investors to enter after their initial offer and launch, and therefore, would not be expected to undertake further marketing throughout the life of the product. Therefore, requirements for a public repurchase offer, as well as one for a public communication by the AIFM willing to de-notify the marketing of a given AIF is not relevant when such fund has only been sold privately and count only very few known investors. Furthermore, in some closed-end structures, managers may even not have the powers to recall units/shares thereof in cases where – given the illiquid nature of the underlying portfolio – no early redemption rights are foreseen[13].

Finally, for open-end structures, investors are notified of a repurchase offer typically when investment terms are amended, especially in cases where the envisaged changes may materially affect the investors. A de-notification of marketing requirements is different, as it does not materially affect those already invested. Also, unlike for a fund's closure, de-notification does not warrant a 30-day public repurchase offer. Even more so and for these reasons, the blanket offer under the new Article 32a(1) letter b) should only be intended for open-end AIFs.

III. Facilities available to UCITS/AIF investors

[11] Presently, nominee account holders are under no obligation to provide this information to AIFMs or UCITS management companies and may furthermore be reluctant to do so in an environment where stricter requirements are being imposed on customer data as per the EU's recent General Data Protection Regulation (GDPR).

[12] In addition, it is important to note that some Member States have a de-notification regime already in place and one which already works along the lines of the proposed new Article 93a(1) letter (b) and (c) for UCITS in the absence of specific minimum thresholds applying.

[13] For closed-end AIF structures, the AIFM may not have the power to proceed to a repurchase of outstanding units/shares in the first place. Assuming the contrary, would also turn an asset manager into a principal and at odds with its stated fiduciary duties towards its investors.

The proposed Directive introduces amendments to the relevant requirements of both the UCITS (new Article 92) and AIFMD (new Article 43a) related to local facilities in the host jurisdictions where these funds are marketed.

EFAMA resolutely supports the removal of the prior obligation for asset management companies to appoint physical local agents, widely regarded to bring no or negligible added-value to local investors, especially in light of the advances in information technology across national borders. However, we suggest the deletion of some of the language of the new Article 92(1), which introduces uncertainty as to whether local presence (…) *in each Member State where it* (the UCITS management company) *intends to market units of a UCITS* (…) is indeed still required. Important is also to clarify no additional documents beyond those foreseen by the Directive are to be notified to the NCA[14].

However, analogous amendments to the existing AIFMD framework via the proposed insertion of a new Article 43a introduce specific rules on a retail regime for AIFs for the first time. This outcome is not justified in light of the fact that, unlike in the UCITS Directive, the AIFMD does not provide for a retail distribution regime. Rather, it is within the national legislator's authority to decide on the rules for retail AIFs.

IV. Changes to notification letters filed with home NCAs

Article 93(1) of the UCITS Directive states that for those management companies wishing to market their units of UCITS in a host jurisdiction, a prior notification letter must be filed with the home NCA, bearing relevant information, relating *inter alia* to marketing arrangements and to the offer of separate share classes. The proposed amendment to Article 93(8) of the UCITS Directive establishes that, in the event of changes to this information, written notice must be provided to the home authorities at least one month before the change is implemented.

We note that this one-month "waiting period" would qualify as an impediment in terms of slowing down time to market for a given UCITS or related new share class. Intuitively, it also appears unjustified, given that any change to marketing information would already have been vetted and approved by the home NCA at the time of notification for changes to the UCITS' prospectus. The written notice requirement introduced under the new Article 93(8) would in this regard serve little or no purpose, and should consequently be reconsidered or preferably deleted altogether to preserve the present requirements for a simple notification.

[14] We note in this respect, for instance, that the Italian CONSOB additionally requires UCITS and AIF management companies alike to file (or "deposit") subscription forms.

PROPOSAL FOR A REGULATION

V. Common marketing communication requirements for UCITS/AIF

In terms of securing a level playing field between UCITS and AIFMD marketing rules and ensuring a greater degree of investor protection, Article 2 of the proposed Regulation attempts to unify marketing rules across the two existing regimes for all types of investors (both retail and non-retail).

As with the de-notification of marketing activities described in Section II of this position paper, the Commission's proposal appears to disregard the prevailing focus of the UCITS Directive on the retail investor *versus* the focus of the AIFMD which remains professional. Whereas the relevant existing UCITS provision (Article 77) targets the marketing of open-end fund structures suited for the former, the AIFMD marketing regime is explicitly intended for the latter type.

Moreover, retail distribution of AIFs remains a matter of national regulation, covering both open-end and close-end structures, offering NCAs an important degree of discretion when tailoring AIF disclosures for their home retail market. The unified requirements for marketing communications introduced by Article 2(1) of the Regulation – beyond the desired commonality for the information to be fair, clear and not misleading regardless of the investor type - also confuse important distinctions between communications more appropriate for a retail *versus* a professional audience and of which the PRIIPs key information document (KID) is perhaps the best example.

For these reasons, EFAMA deems the contents of Article 2 to be disproportionate and would call only for the first and last paragraph of Article 2 to be retained, albeit with amendments.

VI. *Ex-ante* verification of marketing materials

Article 5 of the proposed Regulation offers the NCAs an option to require the systematic notification of marketing communications from UCITS management companies prior to their dealings with end-investors. The same option is also extended to AIF management companies intending to market AIFs to retail investors. It is also specified that such option shall not count as a condition for the marketing of these funds' units/shares to retail investors.

With regard to the notification of marketing materials, we object to the "systematic" transmission of these to the NCA, opting for a more selective approach based on a case-by-case basis, as per established practices in already a number of jurisdictions.

Moreover, we would suggest that the period allowed for those NCAs requiring the prior notification of marketing communications for their verification be reduced from the proposed ten to five working days in Article 5(1). The proposed Regulation should clarify that, where these NCAs remain silent at the expiration of such period, the management company shall deem that its marketing communications are fit for use. In practice, even after a management company has submitted the fund's materials to the attention of the NCA, it would still prudently choose to not market the fund pending the final approval by the authority of its marketing materials and thus avoid the related costs and reputational risk of needing to amend such materials following the instructions of the NCA after having previously distributed them. We therefore consider that the proposed ten days would be excessive and that the silence of the NCA in the course of the reduced five working-day period should be interpreted as a tacit approval of the marketing communications.

We generally regret that the Commission's proposal has not been more ambitious in banning Member States from introducing additional requirements for marketing materials, unrelated to national tax regulations. In particular, given the fact that rules regarding the distribution of financial instruments

through investment firms, as well as rules on mandatory sales material such as prospectuses or KIIDs are harmonised, the proposed Regulation would fall short of its potential. At the very least, marketing communications compliant with MiFID II requirements should not be notified at all[15]. MiFID II provides for a detailed set of marketing requirements in case an investment firm distributes funds. Asset management companies using marketing materials that are compliant with such rules should therefore not be required to additionally submit such materials to the NCA. Furthermore, it is questionable whether mere cultural differences should indeed allow NCAs to request specific contents or formats for marketing material.

VII. Fees and charges levied by NCA and their transparency

With regard to fees and charges levied by NCAs in the exercise of their functions under both UCITS and AIFMD frameworks, we resolutely welcome the clear reference to their proportionality under Article 6(1) of the proposed Regulation, alongside the important disclosures under the following Article 7 bringing about greater transparency around what triggers such fees and charges, including their payment process. Greater clarity and legal certainty as a core business principle is essential for asset management companies to market their fund suites cross-border and we also agree with the proposal's intent allowing ESMA to (i) collect information on fees and charges from the NCAs, (ii) develop draft regulatory technical standards to specify the information on these costs to be received from NCAs, and (iii) maintain a related interactive database and tool as per Articles 8 and 9 of the Regulation. Concerning the latter provisions, EFAMA would also propose for the ESMA interactive database/tool to be expanded to include timelines for obtaining authorisations/registrations with the NCA, as well as a compendium on any local reporting requirements or distribution rules providers would need to be aware of.

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[15] In this regard, please refer to Article 24(3) of the Directive 2014/65/EU and Article 44 of its implementing Directive 2017/565/EU.