Challenges and regulatory prospects in EU cross-border UCITS/AIF registration

Received (in revised form): 28th September, 2020

Josef El Semari
Vice President and Head of the Global Fund Registration Department, ACOLIN Europe AG, Germany

Josef El Semari

Josef El Semari *is Vice President and Head of the Global Fund Registration Department of ACOLIN Europe AG, based in Konstanz, Germany. He joined ACOLIN more than three years ago and supports the company's clients with his expertise in cross-border registration. He holds a bachelor of business law. ACOLIN Group is a leading independent service provider for asset managers and investment fund companies aiming to distribute their products on a cross-border basis. It was founded in 2006, and is currently partnering with over 1,800 funds and 600 asset managers worldwide in over 30 countries. ACOLIN is headquartered in Switzerland (Zurich) with subsidiaries in Germany, UK, Italy and Serbia as well as representative offices in Ireland and Spain.*

Abstract

The European investment fund market remains strongly nationally fragmented. Most of the asset managers in Europe distribute their funds only within their own country. They abstain from cross-border funds distribution due to very varying and complex regulation within European countries. Entering new European markets to distribute funds still proves to be time- and resource-intensive, despite European Union's (EU) efforts to harmonise the relevant legislation across Europe and allow free exchange and flow of capital. The investor shall therefore come into the benefit of more choice, better value and greater protection. This paper takes a closer look at the current situation of the fund's distribution in Europe in light of the recent legislation updates, pointing out potential challenges and possible outlook on the future of cross-border fund distribution. It outlines the findings from the practical experience of the Global Fund Registration Team of ACOLIN Group, based on its daily practice of assisting clients in entering new markets and maintaining funds under multiple jurisdictions. Some examples illustrate concrete hurdles asset managers face on a regular basis when distributing funds cross-border in EU.

Keywords: funds distribution, European fund market, Capital Market Union, cross-border distribution, UCITS directive, AIFMD, third country passport, Brexit

ACOLIN Europe AG, Reichenaustrasse 11 a-c, D-78462 Konstanz, Germany
Tel.: +49 7531 2090072; E-mail: josef.elsemari@acolin.com

Journal of Securities Operations & Custody
Vol. 13, No. 1, pp. 62–71

1753-1802

INTRODUCTION

The notion of the European Single Market refers to a single market that aims to ensure the free movement of goods, capital, services and labour — the 'four freedoms' — within the European Union (EU).[1] Although this concept may sound very promising in theory, reality sometimes looks a little different, also when it comes to the distribution of funds across various countries within the EU. In this context, the European investment fund market remains strongly nationally fragmented. According to the data provided by the European Commission, in 2017, 70 per cent of the assets under management in the EU were owned by investment funds that only operated in their home countries. Only 37 per cent of Undertakings for Collective Investments in Transferable Securities (UCITS)[2] and 3 per cent of Alternative Investment Funds (AIFs)[3] were registered in more than three EU jurisdictions.[4] Varying regulatory and supervisory frameworks for cross-border marketing of UCITSs and AIFs are the main reasons for this situation.

Although the cross-border distribution of AIFs almost doubled between June 2017 and October 2019, rising from 3 per cent to 5.8 per cent of AIFs, and a majority of the Alternative Investment Funds Managers (AIFMs), public authorities and institutional investors responding to a general survey reported that access to national markets had increased due to the Alternative Investment Fund Managers Directive (AIFMD), 34 per cent also reported an increased time to market.[5]

In response to this issue, on the 20th June, 2019, the European Parliament and the Council introduced an amended framework for the cross-border distribution of funds with the aim of achieving greater harmonisation.

The objective of this new Directive 2019/1160[6] and Regulation 2019/1156[7] is to eliminate regulatory obstacles that inhibit the cross-border distribution of funds within the EU in order to improve the ability of asset managers to take full advantage of the benefits of the single market. In particular, the new rules establish a harmonised definition of premarketing and denotification, specify new requirements for the facilities available to investors and achieve to create a central database for cross-border marketing.

This legislation is a part of the effort to establish a more efficient single market for capital — Capital Markets Union (CMU)[8] — whose objectives include the removal of regulatory barriers to investment funds, the suppression of divergent national rules, the strengthening of competition and the development of intracommunity distribution of investment funds. As a result, the investor shall benefit from more choice, better value and greater protection.

By 2nd August, 2021, at the latest, EU Member States shall transpose the new Directive 2019/1160 into national laws. The clock is ticking and the whole industry is curious whether the various adjustments will lead to a genuine simplification and harmonisation of cross-border distribution.

On a separate note but related to the same topic, on the 10th of June, 2020, the European Commission published a report[9] assessing the application and scope of the AIFMD[10] in consideration of the distribution of AIFs to retail investors and the activation of a third country passport.[11]

In response to this, on 18th August, 2020, the European Securities and Markets Authority (ESMA) sent a letter to the European Commission highlighting elements of the AIFMD that it considers could be substantially improved.[12]

In this paper, we will take a closer look at the revised legal framework and the meaning of the individual changes, point out potential challenges with the corresponding implementation and venture a possible outlook on the future of cross-border distribution.

LATEST LEGISLATIVE DEVELOPMENTS

With the aim of facilitating cross-border distribution, the European Parliament and the Council introduced the new Directive 2019/1160 and Regulation 2019/1156 on 20th June 2019.

One of the most important changes in the legislation - which could eliminate ambiguities of the past - was the introduction of a harmonised definition of 'pre-marketing' for AIFs.

Although no updates are provided for UCITS, the new Directive allows AIFMs to engage in pre-marketing activities to test an investment strategy or an investment idea with EU professional investors. They can check their interest in an AIF or a "compartment" that either has not yet been established, or has been established, but not yet been notified for marketing in the respective Member State where the potential investors are domiciled or have their registered office. In other words, the

aforementioned applies to all AIFs and their sub-funds, whether incorporated or not, in the pre-marketing notification phase.

The Directive lays down requirements for the pre-marketing activities of EU AIFMs, in particular to avoid that investors acquire AIF units or shares in the pre-marketing phase. It introduces an obligation for EU AIFM to inform their home Member State of their pre-marketing activities within two weeks of the start of the pre-marketing phase and a presumption that any acquisition of AIF units or shares during the first 18 months following the start of the pre-marketing phase is the result of marketing.

As a further harmonisation measure, a uniform 'de-notification'/de-registration process for the marketing of units or shares of AIFs/UCITS has been introduced.

The implementation of the harmonised procedure depends, inter alia, on the submission of a letter to the competent authorities of the UCITS or AIFMs home Member State[13] containing a set of information. Host Member State authorities[14] will continue to be provided with relevant information and will retain a role comparable to that of the UCITS or AIFM Directive in relation to marketing. In this context, the intention to terminate arrangements for marketing needs to be published and any contractual agreement with any third-party provider needs to be discontinued with effect from the date of de-registration in order to prevent further offering or placement of the units or shares.

Furthermore, the new rules determine that Member States shall not require a local physical presence for the provision of local facilities for investors.

The next point to note is that where fees or costs are charged by the competent authorities for the exercise of their functions in relation to the cross-border activity of UCITS and AIF, those fees or costs must be in line with the total costs associated with the exercise of the tasks of the competent authority. Therefore, the supervisory authorities shall publish on their websites a list of the fees and charges as well as the calculation methodologies.

Finally, the creation of a new central database on cross-border marketing of AIFs and UCITS has been introduced. By 2nd February 2022, the European Securities and Markets Authority (ESMA) shall publish on its website a central database, publicly accessible, listing all AIFs and all UCITSs as well as the Member States in which they are marketed. In order to keep it updated, on a quarterly basis, competent authorities of home Member States shall communicate to ESMA the information that is necessary for the creation and maintenance of the central database.

TRANSPOSITION INTO NATIONAL LAWS — HARMONISATION IN SIGHT?

While the Regulation 2019/1156 is already effective since 1st August, 2019, Member States shall — by 2nd August, 2021, at the latest — transpose the new Directive 2019/1160 into national laws. In the following, the author describes some of the aforementioned changes in more detail and ventures into a preview of possible obstacles in transposing those into national laws.

Above all, it will be interesting to see how the Member States will react to the removal of the requirement to appoint 'facilities' fulfilling the paying — and/or information agent function for UCITSs and for AIFs distributed to retail investors.

Until now and when talking about local agencies, there is, for example, the legal requirement in the United Kingdom to appoint a so-called 'Facilities Agent', in Germany the 'Information Agent', in France the 'Centralizing Correspondent Agent', in Luxembourg the 'Paying Agent' and in Spain the 'Spanish Representative'. This creates a need for foreign local agencies,

with varying functions and of course different prices, which has been a big obstacle for the cross-border distribution in the past. At least 17 Member States currently require that local facilities are present in their territory in case of cross-border distribution of UCITS funds, while the other Member States do not require a physical presence.[15]

According to the legal amendments, UCITS and AIFMs marketing AIFs to retail investors have to ensure that payments, subscription and redemption requests, procedures detailing such payment or request processes, fund documents etc are available to investors in the countries where they market, but are no longer required to fulfil these tasks by appointing a local physical presence.

In other words, UCITS are not obliged to be represented by a physical presence in each Member State where marketing activities are carried out but would allow fund managers to use electronic or other means of distance communication with investors. The information and means of communication should be available to investors in the official languages of the Member State where the investor is located.

It remains to be seen whether this will be the definitive end of a local presence in the host country or whether the countries will set up new hurdles in transposition of the directive.

Referring to the introduction of a harmonised definition for pre-marketing for AIFs, almost every discussion between the fund manager and a potential investor about the investment strategy of a future fund could be classified as pre-marketing. According to the new directive, this now also requires a new notification process and documentation obligations.

For example, the fund manager must submit an informal written or electronic notification to the home regulator within two weeks of the start of the pre-marketing ie a brief description of the pre-marketing, including information on the investment strategies presented, details of the location (member states), the fund (list of AIF, if applicable) and the time period.

In addition, the premarketing must be 'appropriately documented'. If documents are passed on in the pre-marketing phase, they must contain a disclaimer stating that this is not an offer or invitation to subscribe for units, that the documents are not binding and that they are subject to change.

This means once the contract has finally been negotiated, investors, however, cannot sign immediately as it is mandatory to carry out a notification procedure prior to the signing. Therefore — provided that the home regulator has been informed accordingly about the pre-marketing activities — also the notification according to Article 32 AIFMD of distribution in the respective host country needs to be filed vis-à-vis the home regulator. Only after a successful notification (in practice, the home authorities have 20 business days for reviewing and forwarding the respective notification package to the relevant host authorities), the contract can be signed, and the fund can be officially distributed. This time-consuming procedure could prove to be burdensome and discourage investors who may be initially willing to subscribe.

According to the EU Directive, the new rules on pre-marketing only apply to offers to professional investors. It is not yet clarified whether country-specific subcategories of professional investors as eg the semiprofessional investors in Germany will be also covered. Furthermore, the relevant countries need to define the indefinite legal term unfinished[16] in order to specify how offer documents have to be in order to be suitable for pre-marketing and to what extent advertisement and documentation must be provided.

The concept of reverse solicitation[17] is also not applicable here as during a

lockup period of 18 months from the start of premarketing, this is to be excluded. In other words, every subscription to a fund unit within this period, which takes place at the initiative of the investor, is classified as the result of the sale — with the above-mentioned mandatory procedure.

Concerning the implementation of a common 'de-notification' process, the implementation of the harmonised procedure depends, inter alia, on the submission of a letter to the competent authorities of the UCITS or AIF home Member State containing a set of information. Host Member State authorities will continue to be provided with relevant information and will retain a role comparable to that of the UCITS or AIFM Directive in relation to marketing — but now via the Home Member State.

To give an example of the current procedure, there have been inconsistencies to date in the interpretation of the UCITS Directive on this subject.[18] In general, deregistration has been executed through the host authority. The ACOLIN Europe AG Global Fund Registration Team has, however, been contacted by certain regulators with the request to contact the home authority although the interpretation of Article 93 par. (7) of Directive 2009/65 in general has been quite the opposite. In cases like this, the relevant home authority reacted very surprised and as a third party we were dependent on the goodwill of the home authority to avoid a stalemate. Therefore, a harmonised approach regarding the deregistration procedure would be very much welcomed.

As from 2nd February, 2022, ESMA will publish databases to provide overviews of local regulatory fees, local requirements and a central UCITS and AIF register, listing all cross-border distributed funds and their European marketing countries. Such databases will be based on regular reporting that regulators must file to ESMA.

As a first step, on the 31st March, 2020, the ESMA launched a consultation on the draft implementing technical standards (ITSs) for the filing into the database under Regulation (EU) 2019/1156 of 20th June, 2019, on facilitating cross-border distribution of collective investment undertakings.[19] The focus hereby is on national laws, regulations and administrative provisions governing the marketing requirements for AIFs and UCITS and their summaries; and Regulatory fees and charges levied by them for the performance of their tasks in connection with the cross-border activities of fund managers.

Regarding fees in particular, the hope is that a certain pressure will be created in order to force the supervisory authorities to act to harmonise the fees. Currently, there is a very high discrepancy in the level of supervisory fees. For example, the French supervisory authority charges €2000 for a UCITS notification, whereas the German supervisory authority BaFin charges only €380.

In this context, national regulatory authorities expect that a written pricing methodology for UCITS and AIFs will be developed. This requires the implementation of the ESMA proposal of 4th June, 2020, addressed to national regulators.[20] The aim of the ESMA proposal is to prevent excessive costs being charged to investors in UCITS and AIF. In complement to the documented pricing process, it proposes how national supervisors can use their supervisory processes to prevent excessive costs being charged and what action should be taken when excessive costs are incurred.[21]

ESMA expects to publish a final report by 2nd February, 2021, based on the feedback received.

AIFMD REVIEW — AIF TO RETAIL

On 10th June, 2020, the European Commission published a report assessing the

application and scope of the AIFMD. Article 69 of the AIFMD requires the European Commission ("the Commission") to review the scope and application of the AIFMD in order to assess its impact on investors, AIFs and both EU and non-EU AIFM and to determine to what extent the objectives of the AIFMD have been met. The Commission is also mandated to propose legislative amendments based on this review.

According to the report, the efficiency of the EU AIFM passport has been impaired by national 'gold-plating',[22] as well as divergences in national marketing rules caused by different interpretations of the AIFMD by national supervisors.[23]

The report also highlights the fact that the AIFM passport allows marketing only to professional investors, and not, for example, retail, and not, for example, retail investors.

Here, they are often the subject of restrictive national marketing rules. AIF distribution is subject to Markets in Financial Instruments (MiFID II)[24] rules, which differentiate between retail and professional investors; therefore, any change to the definitions of the types of investors in the AIFMD needs to take into account the interaction of the AIFMD with the relevant provisions of MiFID II.

Out of experience, the ACOLIN Europe AG Global Fund Registration Team has learned that the notification of an EU-AIF/AIFM for distribution to retail investors is a very challenging, time-consuming and price-intensive process.

Article 43 AIFMD only states that the member states are responsible for the requirements and should not adopt stricter rules than those applicable to AIFs in their home country. Article 43 does not differentiate between EU-AIF and non-EU AIF or if the AIF is distributed on a domestic cross-border basis.

Accordingly, the main source of information is provided by the respective national law, which is rarely fully available in English. In case the domestic law is available in English, it is usually not the current version. Even if the most recent version in English is available, the version in your home language will of course take precedence. And in addition, the entire notification process is not recorded in one law, but in several different laws.

To remove ambiguities embodied in the relevant law, as an asset-management company or its service provider, there is no other choice but to contact the supervisory authorities directly and thus depend on their willingness to react. Besides the appointment of a local agent, some national authorities require a full application in foreign language, translation of all legal documents with officially certified translation including Apostille. Often the supervisory authorities ask for a detailed legal assessment, which compares national and foreign law, in order to prove that the protection of retail investors in the respective countries is at the same level.

All these factors make the involvement of local legal advisers by the asset managers inevitable, which pushes the costs even higher.

Due to these hurdles, it is hardly surprising that the popularity of this cross-border fund distribution variant is limited. As an example, following an inquiry with the Spanish regulator, The Spanish National Securities Market Commission, earlier this year, The ACOLIN Europe Global Fund Registration Team was informed that there has not been a single foreign AIFM/AIF registered for retail distribution in Spain.

In response to the report of the European Commission, ESMA sent a letter to the European Commission on 18th August, 2020, highlighting elements of the AIFMD, which in its view could be substantially improved.[25]

ESMA refers to the category of semi-professional investors as known in Germany and is looking at introducing the

cross-border concept of 'semi-professional investor' in the AIFMD. It, however, recognises that this should be combined with adequate investor protection provisions. In regards to the aforementioned hurdles in the AIF to retail distribution, it highlights that from ESMA's point of view passporting activities should be allowed only in relation to the marketing to professional investors.

Among other things, the response of ESMA also superficially addresses the necessity for clarification of the exact responsibilities of home and host supervisory authorities, such as in the context of the AIF cross-border registration under Article 32 AIFMD.

THIRD COUNTRY PASSPORT — BREXIT AS A TRIGGER?

Currently, AIFs and AIFMs based in third countries may only access investors in individual Member States on the basis of national laws set out in National Private Placement Regimes (NPPRs).

Historically, when the AIFMD was adopted in 2011, and entered into force in 2013, it was stipulated that NPPR may only apply until 2018. The Brexit negotiations, however, have delayed this deadline initially to 2020. ESMA emphasised that from 2020 onwards, only under the third-party AIFM regime pursuant to ART 37 AIFMD, authorised cross-border non-EU AIFM may market their products within the EU with an appointed legal representative.[26]

The role of NPPRs is recognised by stakeholders as an important factor for the development of the market in the absence of activation of the AIFM passport for third countries entities. As a result, investors in Member States with such schemes have been able to enter to global markets for financial services. NPPRs, however, differ from one Member State to another and, more importantly, they require AIF to implement only a very limited number of the AIFMD requirements. This results in un-Level rules between EU and non-EU AIFM. Some Member States have closed the market to third-country entities completely. Some Member States have made further proposals for harmonisation of the NPPRs, while others consider that the activation of the AIFMD passport for third-country units, followed by a gradual abolition of NPPRs, would be a better solution to this problem.

Although, already in 2016, ESMA had issued a recommendation to the European Commission to implement the ART 37 AIFMD 3rd Party Regime[27]; it has never been activated.

As previously stated, the AIFMD is an essential key of the CMU with the aim of facilitating improved monitoring of risks to the financial system and cross-border capital raising for investments in alternative investments.

In this context, on 10th June, 2020, the European Commission published a report assessing the application and scope of the AIFMD in consideration of the distribution of AIFs to retail investors and the third-country passport.

It is therefore very welcome that the European Commission also addressed this topic as a major objective of ensuring a properly functioning third-country passport. And for an efficiently functioning and transparent European asset-management market, it is essential that non-EU management companies can offer their services in Europe. The issue of the third-country passport has now become even more important due to Brexit.

NPPRs differ across Member States, but do not generally require firms to comply with as many requirements as under the AIFMD. This led to an un-level playing field between EU and non-EU AIFMs. In some countries, the notification process for distribution to professional investors

is well explained on the website of the foreign regulator and is straightforward, while in other countries, it is considered impossible.

A variety of opinions and stances exist across the EU on third-country access. While some advocate harmonising NPPRs, others favour activating the third-country passport and phasing out NPPRs. And as mentioned before, certain Member States have prevented access entirely by third-country AIFMs.

The Dutch financial authority AFM directly reacted to the aforementioned report and proposes a phased approach, in which the various NPPRs of Member States would continue until the third-country passport has proved to be a viable option in practice.

In this context, it was hoped that Brexit could possibly act as a kind of trigger for the introduction of a third-country passport, but the time is running out.

At the end of the year, the transitional period agreed between the EU and the UK for the period following the United Kingdom's withdrawal from the EU on 31st January, 2020, will expire. Against this background, the European Commission issued a 'Communication on Preparedness at the End of the Transition Period' on 9th July, 2020.[28]

Despite the hopes for a third-country passport, the Commission here is only stating the following sobering facts.

When the transition period ends, UCITS and AIFs authorised or registered in the UK will become non-EU AIFs. Any entities authorised by EU-competent authorities managing these (former) UCITS authorised in the UK will need to obtain an authorisation. AIFMs established and authorised or registered in the EU managing non-EU AIFs that are not marketed in the EU must comply with Directive 2011/61/EU. The marketing of non-EU AIFs managed by an AIFM established and authorised or registered in the EU is subject to the relevant National Private Placement Regimes.

As a third-country passport would also put an end to non-EU funds for a clear procedure and Europe-wide fragmentation, ACOLIN Europe AG hopes that the activation of the third-country passport will be accelerated in due course.

OUTLOOK

The upcoming months will be of great importance in assessing whether there will be further and significant harmonisation of legislation related to cross-border fund distribution.

On the one hand, it can be stated that the introduced Directive and Regulation improve the legal framework for the cross-border marketing of collective investment undertakings in the EU, especially by introducing a harmonised approach to the premarketing of AIFs and streamlining the deregistration procedure for marketing. By removing regulatory barriers and increasing harmonisation, the new rules have the potential to create more confidence and facilitate the cross-border marketing of collective investment within the EU. As the new provisions, however, need to be transposed into national law by the Member States until 2nd August, 2021, a certain number of unknown factors remain, which could even have a counterproductive effect on the harmonisation.

On the other hand, the Commission may make proposals, including legislative amendments, following the review of the AIFMD. It is expected that the Commission will publish a consultation on the AIFMD in Q4 2020, and any subsequent legislative proposals are expected to follow in mid-2021. Here, the negotiation of a withdrawal agreement with the UK until the end of 2020 and the possible activation of a third-country passport are the factors

that could lead to a more unified approach and bring us a significant step closer to the idea of harmonisation and ensuring the 'four freedoms'.

References and Notes

(1) European Commission, 'The European single market', available at: https://ec.europa.eu/growth/single-market_en (accessed 23rd September, 2020).
(2) Undertakings for Collective Investment in Transferable Securities.
(3) Alternative Investment Fund.
(4) European Commission (2018) 'Commission staff working document', Brussels, March 12, p. 7, available at: https://ec.europa.eu/transparency/regdoc/rep/10102/2018/EN/SWD-2018-54-F1-EN-MAIN-PART-1.PDF (accessed 23rd September, 2020).
(5) European Commission (2020) 'Report from the commission to the European Parliament and the Council', Brussels, June 10, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020DC0232&rid=7 (accessed 23rd September, 2020).
(6) EUR-Lex, 'Directive (EU) 2019/1160 of the European Parliament and of the Council of 20 June 2019 amending Directives 2009/65/EC and 2011/61/EU with regard to cross-border distribution of collective investment undertakings (Text with EEA relevance.)', available at: https://eur-lex.europa.eu/eli/dir/2019/1160/oj (accessed 23rd September, 2020).
(7) EUR-Lex, 'Regulation (EU) 2019/1156 of the European Parliament and of the Council of 20 June 2019 on facilitating cross-border distribution of collective investment undertakings and amending Regulations (EU) No 345/2013, (EU) No 346/2013 and (EU) No 1286/2014 (Text with EEA relevance.), available at: https://eur-lex.europa.eu/eli/reg/2019/1156/oj (accessed 13th October, 2020).
(8) European Commission, 'Capital markets union', available at: https://ec.europa.eu/info/business-economy-euro/growth-and-investment/capital-markets-union_en (accessed 13th October, 2020).
(9) European Commission (2020) 'Report from the commission to the European Parliament and the Council', Brussels, June 10, available at: https://ec.europa.eu/transparency/regdoc/rep/1/2020/EN/COM-2020-232-F1-EN-MAIN-PART-1.PDF (accessed 13th October, 2020).
(10) Alternative Investment Fund Managers Directive.
(11) Already on 19th July, 2016, the European Securities and Markets Authority (ESMA) published its final advice to the European Commission on the extension of the marketing passport under the Alternative Investment Fund Managers Directive (AIFMD) to 12 non-EEA countries, including the United States; ESMA, 'ESMA advises on extension of funds passport to 12 non-EU countries', available at: https://www.esma.europa.eu/press-news/esma-news/esma-advises-extension-funds-passport-12-non-eu-countries (accessed 13th October, 2020).
(12) ESMA, 'Review of the alternative investment fund managers directive', available at: https://www.esma.europa.eu/sites/default/files/library/esma34-32-551_esma_letter_on_aifmd_review.pdf (accessed 13th October, 2020).
(13) State where the UCITS/AIFM is domiciled.
(14) Foreign State where the UCITS/AIFM has been notified to for distribution.
(15) European Commission, p. 79, see ref. 4 above.
(16) Art. 30a of DIRECTIVE (EU) 2019/1160 states that if ' . . . a draft prospectus or offering documents are provided, they shall not contain information sufficient to allow investors to take an investment decision . . .'
(17) A request by a professional client regarding units or shares of a specifically designated existing fund without a prior direct or indirect offer or placement (ie solicitation) from the management company or on its behalf; EUR-Lex, 'Report from the commission to the council and the European Parliament accelerating the capital markets union: Addressing national

barriers to capital flows', available at: https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A52017DC0147 (accessed 13th October, 2020).
ESMA highlights in its letter to the European Commission from 18th August, 2020, the need for a harmonised definition of reverse solicitation for investor protection reasons as it is currently subject to different practices and interpretations at national level. ESMA, see ref. 12 above.

(18) According to Article 93 par. (7) of Directive 2009/65, the UCITS shall notify any amendments to the documents referred to in paragraph 2 to the competent authorities of the UCITS host Member State and shall indicate where those documents can be obtained electronically.

(19) ESMA, 'Consultation paper: Draft implementing technical standards under the Regulation on crossborder distribution of funds', available at: https://www.esma.europa.eu/sites/default/files/library/esma34-39-966_-_cp_on_its_on_cross-border_distribution_of_funds.pdf (accessed 13th October,2020).

(20) ESMA, 'ESMA promotes convergence in the supervision of costs in UCITS and AIFS', available at: https://www.esma.europa.eu/press-news/esma-news/esma-promotes-convergence-in-supervision-costs-in-ucits-and-aifs (accessed 13th October, 2020).

(21) 'Supervisory briefing on the supervision of costs in UCITS and AIFs,' available at: https://www.esma.europa.eu/sites/default/files/library/esma34-39-1042_supervisory_briefing_on_the_supervision_of_costs.pdf (accessed 13th October, 2020).

(22) Gold-plating is a term to characterise the process whereby the powers of an EU directive are extended when being transposed into the national laws of member states; available at: https://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/490684/IPOL-JOIN_ET(2014)490684_EN.pdf (accessed 13th October, 2020).

(23) EUR-Lex, 'Report from the commission to the European Parliament and the Council assessing the application and the scope of Directive 2011/61/EU of the European Parliament and of the Council on Alternative Investment Fund Managers', available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2020:232:FIN (accessed 13th October, 2020).

(24) Directive 2014/65/EU of the European Parliament and of the Council of 15th May, 2014, on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU, OJ L 173, 12.6.2014, pp. 349–496.

(25) ESMA, see ref. 12above.

(26) European Commission, see ref. 9 above.

(27) ESMA, 'Advice: ESMA's advice to the European Parliament, the Council and the Commission on the application of the AIFMD passport to non-EU AIFMs and AIFs', available at: https://www.esma.europa.eu/sites/default/files/library/2016-1140_aifmd_passport.pdf (accessed 22nd October, 2020).

(28) European Commission, 'Communication from the commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions', available at: https://ec.europa.eu/info/sites/info/files/brexit_files/info_site/com_2020_324_2_communication_from_commission_to_inst_en_0.pdf (accessed 22nd October, 2020).