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From:	Presidency
To:	Working Party on Financial Services (Asset management)
Subject:	Cross-border distribution of funds (CBDF) - Presidency explanation of its compromise proposal

Delegations will please find attached a Presidency non-paper explaining its compromise proposals as set out in WK 1512/19 (Directive) and WK 1513/19 (Regulation).

The new Presidency compromise proposal on the three main political issues of the Cross-Border Distribution of Funds package takes into account all comments received from Member States.

I. De-notification of cross-border activities by UCITS & AIFMs
(CBDF Directive)

In the paper submitted to Member States for comments before the working party of 24 January 2019, the Presidency team asked for feedback from delegations on a number of questions. The revised text which the Presidency is now proposing reflects the comments that have been received and proposes solutions, which aim at balancing the objective of facilitating the cross-border marketing activities of managers against investor protection and supervision of the market.

Question 1 – Do Member States agree to clarify that de-notification would only concern marketing arrangements as described in the notification letter?

Feedback on Q1:

Most Member States expressed their support for the delimitation of the proposed procedure to the de-notification of marketing activities. While managers may be authorised to conduct other activities or offer services (listed in Annex II of UCITS Directive or Annex I of AIFMD), the specific conditions for de-notification of marketing of their funds are justified by the protection of remaining investors and the need for supervision and monitoring of activities of the manager.

Thus, the Presidency considers it useful to limit the scope of this specific procedure, and the conditions attached to it, to the “arrangement made for marketing” which are notified to host Member State in the context of the passport (Article 93 (1) second subparagraph of UCITS Directive and Annex IV of AIFMD).

Question 2 – Do Member States agree that the manager may de-notify its marketing activities without limitation in the host Member State when it does not intend to market its fund any longer in that Member State? This condition would need to be reflected in the text by a clear statement that no new offering or placement can take place after the de-notification (see possible legal drafting lines 80 and 127 and deletion of lines 73 and 122 in the Annex)?

Feedback on Q2:

While most Member States support the Council text with thresholds, they also show an openness to the European Parliament's approach which favours a de-notification process without quantitative limitation. The Presidency will clarify that de-notification upon discretion of the manager is possible on condition that the marketing is effectively terminated. Moreover, for lines 80 and 127, the Presidency concludes from the delegations' feedback that it is more suitable to refer to "any new offering or new or further placement" instead of "any new offering or placement". This obligation will apply both to the manager and to intermediaries/delegates.

Question 3 – Do Member States agree on adding a safeguard to demonstrate that the marketing arrangements are indeed terminated by the time of effective de-notification or marketing activities (see possible legal drafting line 77a and 124a attached in Annex)?

Feedback on Q3:

Member States broadly agree with the proposed safeguards and conditions provided that it is clarified that they apply exclusively to the specific UCITS/AIF that is subject to the de-notification procedure (as opposed to all UCITS/AIF that that manager markets in the host Member State in question). This concern is addressed by specific drafting adjustment to all concerned provisions. The marketing arrangement made with financial intermediaries has to be modified or terminated with respect to the de-notified fund.

Question 4 - Do Member States agree with additional safeguards which exclude the use of pre-marketing in the Member States in which an AIFM has de-notified its marketing activities (see possible legal drafting in line 127a in the Annex)?

Feedback on Q4:

Member States recognise that once the marketing of an AIF has been de-notified in a host Member State there is no commercial rationale for engaging immediately in pre-marketing activity. However, a time limitation of this prohibition is appropriate.

The Presidency has added a time limit for the prohibition of pre-marketing and further clarified, in line with feedback to Q3, that the prohibition is limited to the AIF that is the subject of the de-notification procedure or similar investment ideas.

The safeguard concerning pre-marketing aims at limiting the risk of circumvention of the passport regime.

Question 5 - Do Member States agree to clarify that the host Member State keeps its general oversight and monitoring competence while it will no longer requires ex post verification of marketing materials as long as the marketing is not notified again in this Member State (see possible legal drafting in lines 84, 84a, 131 and 131a in the Annex)?

Feedback on Q5:

For a number of Member States the general monitoring, supervisory and sanctioning powers of the former host Member State cannot be called into question. However, views are split as to whether specific drafting is required to confirm these powers.

The Presidency considers that, based on the legal reading of the Directives, since the de-marketing has been effectively terminated, the host Member State will no longer have oversight and monitoring powers. To empower the former host authorities to request information from the manager, to monitor its compliance with the disclosure to investor obligations and to exercise other supervisory and monitoring tasks, it is necessary to mirror these powers, which are laid down in UCITS and AIFMD, for the host Member States in order to protect the remaining investors in the respective de-notified AIF/UCITS.

However, the former host Member State will no longer be competent to check marketing materials, insofar as the arrangements made for marketing are terminated.

II. Conditions for pre-marketing of EU AIFs

Question 6 - Do the Member States agree with the introduction of transparency measures which would enable the competent authorities to monitor compliance with safeguards laid down in these provisions?

Feedback on Q6:

Delegations' views are split with respect to additional transparency measures as put forward by the European Parliament. Some see clear merits in this light requirement for information, whereas others fear an administrative burden or potential risk of creating a barrier to pre-marketing.

The Presidency considers an informal letter from the EU AIFM stating the date and details of pre-marketing activities, as put forward by the European Parliament, to be acceptable provided that it is clarified that host NCAs cannot impose additional conditions or requirements on an EU AIFM. Any information to the competent authorities should not prevent pre-marketing or create additional barriers such as authorisation of such activities.

The proposed approach would enable NCAs to determine the beginning of pre-marketing activities and properly monitor the 18 months safeguard established by the Council text.

III. Information on fees and charges

Regulation line 79

Question 7 - How could the reference to performance of functions of the competent authorities be further specified while respecting different budgetary models of the competent authorities in the Member States?

Feedback on Q7:

Based on a clear steer from the delegations, the Presidency maintains the text of the Council's negotiating mandate from June 2018.