

INCEPTION IMPACT ASSESSMENT			
TITLE OF THE INITIATIVE	Reducing barriers to cross-border distribution of investment funds		
LEAD DG – RESPONSIBLE UNIT – AP NUMBER	FISMA – C4-2016/FISMA/082	DATE OF ROADMAP	21/06/2017
LIKELY TYPE OF INITIATIVE	Interinstitutional dossier		
INDICATIVE PLANNING	Q1 2018		
ADDITIONAL INFORMATION	<p style="color: red; font-weight: bold;">This Inception Impact Assessment aims to inform stakeholders about the Commission's work in order to allow them to provide feedback on the intended initiative and to participate effectively in future consultation activities. Stakeholders are in particular invited to provide views on the Commission's understanding of the problem and possible solutions and to make available any relevant information that they may have, including on possible impacts of the different options. The Inception Impact Assessment is provided for information purposes only and its content may change. This Inception Impact Assessment does not prejudice the final decision of the Commission on whether this initiative will be pursued or on its final content.</p>		

A. Context, Problem definition and Subsidiarity Check
Context
<p>This initiative forms part of the Commission's Capital Market Union (CMU) action plan¹ and aims to improve the functioning of the single market for EU investment funds by reducing national regulatory barriers to the cross-border distribution of funds. It builds on responses to the CMU Green Paper, the Call for evidence on the cumulative impact of the Commission's financial reform, the Commission's targeted public consultation on the cross-border distribution of investment funds and the Expert Group on barriers to free movement of capital.</p> <p>The work should be seen in the context of a broader set of measures and work streams aimed at increasing cross-border intra-EU competition of retail investment products. These include the Commission's consumer financial services action plan, the Commission's work to harness the potential of digitalisation and technological developments in financial services (FinTech), and the work with national tax experts on a code of conduct for withholding tax relief principles.</p> <p>Furthermore, the Commission has recently completed a public consultation on the operation of the European Supervisory Authorities (ESAs)². To the extent that this initiative develops the role of the European Supervisory and Markets Authority (ESMA), it will align with the outcome of the ESAs review.</p>
Problem the initiative aims to tackle
<p>EU collective investment funds are regulated under the Undertakings for Collective Investment in Transferable Securities (UCITS) Directive and the Alternative Investment Fund Managers (AIFM) Directive and have €13.38 trillion assets under management (AuM). While the directives' marketing passports have had some success in supporting the distribution of funds across national borders within the EU, much of the market remains structured along national lines. Funds marketed cross-border represent about €5.4 trillion AuM (40% of total AuM) and 57% of all EU funds. However, of the €5.4 trillion, a quarter comprises 'round-trip funds' marketed cross-border to only one country, typically the country where the asset manager is located.</p> <p>Responses to a Commission consultation on the cross-border distribution of investment funds identified a range of regulatory barriers that, alongside other reasons such as distribution models, national tax regimes, and investor home-bias, cause market fragmentation. The regulatory barriers are largely due to different approaches adopted by Member States in how the marketing passport may be exercised and responses suggest that a combination of barriers – rather than any individual barrier – prevents asset managers from fully exploiting the marketing passports. These barriers include differing marketing requirements/practices, the imposition of local agents, additional national disclosure requirements, differing and non-transparent regulatory fees, inefficient procedures for updating notifications, a lack of support for online and direct distribution and more broadly a lack of transparency regarding national requirements. The wider (non-regulatory) barriers, including taxation, are outside the scope of this initiative but the Commission aims to address these through broader work, including the work streams as set out in the section on the context of this initiative.</p>

¹ http://ec.europa.eu/finance/capital-markets-union/docs/building-cmu-action-plan_en.pdf

² https://ec.europa.eu/info/finance-consultations-2017-esas-operations_en

For asset managers, the barriers give rise to added costs when distributing their funds, which act as a disincentive to distributing more widely, leading to market fragmentation, lower efficiency and a failure to foster economies of scale. For investors, the barriers result in a limited supply of funds in their domestic market which, coupled with a tendency to purchase domestic funds, leads to lower competition and less choice for investors across parts of the EU.

Subsidiarity check (and legal basis)

The legal basis for this initiative is Article 114 of the Treaty on the Functioning of the European Union (TFEU), which confers to the European institutions the competence to lay down appropriate provisions that have as their objective the establishment and functioning of the internal market. The problem this initiative aims to tackle is directly related to the use of the marketing passport for investment funds as provided for in existing EU rules, and as such, concerns the functioning of the internal market. Action at EU level is best placed to address the identified problem, as feedback from the consultations clearly shows that national implementation of UCITS and AIFM Directives resulted in differing interpretations of the rules applicable to the use of the marketing passports under these two Directives. Furthermore, to address certain regulatory barriers it might be necessary to amend the existing EU legislation.

B. Objectives and Policy options

The overall aim of this initiative is to support the CMU objective of establishing a genuine single capital market in the EU. A more fully integrated European market for investment funds will reduce market fragmentation; bring greater economies of scale; and increase competition across the EU, which should lead to more choice and lower costs for investors.

The initiative aims to improve the functioning of the single market for European investment funds, by reducing regulatory barriers to the cross-border distribution of funds, while maintaining a high level of investor protection. Identified policy areas for addressing the regulatory barriers are:

- **Marketing.** Options include: harmonisation of national marketing requirements and practices, harmonisation of what constitutes marketing, sharing of best practices between Member States.
- **Administrative requirements.** Options include: prohibit requirements in national legislation to appoint local agents in the host Member State, or prescribe conditions under which local agent may be required. Additionally it could be envisaged to harmonise national disclosure requirements.
- **Regulatory fees.** Options include: create a central repository for information on regulatory fees, and introduce a principle of proportionality between the fee and supervisory work undertaken.
- **Notification requirements.** Options include: simplify the process for updating notifications under the marketing passport, establish a central hub for notifications, amend criteria for when updating notification is required. Additionally, it could be envisaged to harmonise procedures and/or conditions for de-registration.
- **Online distribution.** Options include: Providing clarity over application of marketing rules for online distribution, taking steps to address other barriers including national implementation of anti-money laundering rules and know-your-customer requirements.

It should be noted that the policy options that potentially develop the role of ESMA – in particular in the area of regulatory fees and notification requirements – may alternatively be covered by the upcoming initiative on the review of the ESAs.

The form of the initiative will follow the policy choices made. The **baseline scenario** foresees no regulatory or other change. A **non-legislative initiative** could, seek to address barriers through a combination of voluntary collaborative actions by Member States. Finally, a **legislative initiative** could harmonise rules currently subject to national legislation and further align implementation of AIFMD and UCITS requirements.

C. Preliminary Assessment of Expected Impacts

Likely economic impacts

Reducing barriers to the cross-border distribution of funds is expected to reduce inefficiencies in the Single Market and support the CMU objective of boosting growth and investment, facilitating the efficient allocation of capital. It is also expected to increase competition between investment funds, especially in smaller markets where it may not have previously been cost-effective for asset managers to market using the passport, which should lead to more choice and lower costs for investors.

Likely social impacts

There is no relevant social impact from this initiative.

Likely environmental impacts

There is no relevant environment impact from this initiative.
Likely impacts on fundamental rights
There is no relevant impact on fundamental right from this initiative.
Likely impacts on simplification and/or administrative burden
This initiative will simplify regulatory requirements for distributing funds across the EU through reducing differences in the national requirements that have to be complied with. This should also reduce the administrative burden for asset managers.
D. Data Collection and Better Regulation Instruments
Impact assessment
An impact assessment is being prepared to support the preparation of this initiative and to inform the Commission's decision.
Data collection
Data collection will take place through drawing upon the results of the open consultations and surveys that have already taken place, through further engagement with National Competent Authorities (NCAs), trade bodies and their members, and by utilising other relevant work streams in the Commission and available (commercial) databases. In addition, ESMA has conducted a survey of National Competent Authorities, which has provided further details on national practices in regard to marketing, administrative arrangements and regulatory fees.
Consultation strategy
Responses to the open public consultations on the CMU Green Paper and the Call for evidence on the cumulative impact of the Commission's financial reform have provided qualitative evidence to support development of an impact assessment. These consultations were followed by a 12-week open public consultation specifically on barriers to the cross-border distribution of funds from June to October 2016. The Commission received 64 responses to this consultation. The majority were from industry associations and individual asset managers. The remainder of replies came from public authorities and a range of other respondents, including consumer organisations and private individuals. Responses contained a mixture of qualitative and quantitative evidence. In addition, the Commission has conducted a series of workshops consulting informally with a number of trade bodies and their members. Further consultation was through the Member States' Expert Group on Barriers to Free Movement of Capital, which considered a range of issues, including the definition of pre-marketing and greater transparency on regulatory fees. The Commission will engage in further targeted consultations and discussions with trade bodies and their members, consumer groups and National Competent Authorities.
Will an Implementation plan be established?
If a legislative approach is taken to enact this initiative, one possible option is a directly applicable Regulation. In case a Directive is chosen, an implementation plan will be established.