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Facilitation of cross-border fund distribution
BVI's[1] comments in view of the upcoming trialogue

Besides the urgent need for an extension of the UCITS-exemption within the PRIIPs-Regulation and our full support of the respective proposal of the European Parliament (EP), we generally support the intention to remove regulatory barriers for the cross-border distribution of investment funds while at the same time ensuring an appropriate level of investor protection. Many of the proposed changes will indeed facilitate cross-border distribution, in particular in light of the Council's and the EP position. In view of the upcoming trialogue, we would like to present our views on specific topics:

Restrictions following pre-marketing activities (Art. 4 (1) (aea) and 30a AIFMD)

Both the Council and the EP consider pre-marketing as activities for AIFs which are not yet established or which are established but not yet notified for marketing in accordance with Articles 32 AIFMD. In addition, following pre-marketing, investors may only invest in AIFs under marketing permitted under Articles 31 or 32 AIFMD and any acquisition within 18 months after pre-marketing shall be considered as result of marketing and be subject to the applicable notification procedure in Articles 31 or 32 AIFMD.

The proposal's objective is to improve and to facilitate the cross-border distribution of investment funds. It should therefore only cover cross-border situations and not have any impact on purely national situations. Otherwise the impact of the file would be much broader. It would therefore also call for a clarification of a discussion of the possibility to place funds to a limited number of investors without the same legal consequences as an offer to a broad range of investors (private placement) as well as the situation where investors approach asset managers (reverse solicitation). However, this discussion is envisaged for the review of the AIFMD. Clearly, the passporting concept of the AIFMD should not be circumvented by way of pre-marketing. Furthermore, a coherent understanding of conditions for testing a market other than the home member state will facilitate cross-border distribution. However, on a pure national level, market participants have to notify the home member state authority continuously, e.g. about fund rules for every AIF they intend to manage (see Article 7 (3) (c)). The AIFM's home member state therefore is generally informed of all activities of the AIFM. Consequently, **the cross-border distribution file should not provide rules for pure national situations like the relationship between pre-marketing and marketing on a national level.** On the contrary, it should allow national competent authorities to continue their market practice on a pure national level and allow for a thorough discussion regarding marketing and notification including private placement and reverse solicitation within the review of the AIFMD.

Conditions for Pre-Marketing (Art. 4 (1) (aea) and 30a AIFMD)

Relating to the pre-marketing definition and its preconditions, both the Council's and the EP's position allow for investment ideas to be tested for new funds and – unlike the European Commission (EC) – for already established funds. While the Council requires that the prospectus should not contain relevant information allowing investors to take an investment decision, the EP focuses on the question whether the documents allow the investor to invest. The Council does not require notifying pre-marketing activities, while the EP requires a letter to both the home as well as the host member state.

[1] BVI represents the interests of the German fund industry at national and international level. The association promotes sensible regulation of the fund business as well as fair competition vis-à-vis policy makers and regulators. Fund companies act as trustees in the sole interest of the investor and are subject to strict regulation. Funds match funding investors and the capital demands of companies and governments, thus fulfilling an important macro-economic function. BVI's over 100 members manage assets of more than 3 trillion euros for private investors, insurance companies, pension and retirement schemes, banks, churches and foundations. BVI's ID number in the EU Transparency Register is 96816064173-47. For more information, please visit www.bvi.de/en.

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We support both the Council's and the EP's approach regarding the conditions for pre-marketing. In particular, it is important for investors to get a proper understanding of the investment ideas or strategies proposed by the manager. This also comprises the possibility to review draft documents. Since in practice, it might be difficult to determine, whether documents allow investors to take an investment decision, the EP's approach with a focus on the ability to invest will be easier to handle. Regarding a notification of pre-marketing activities, we understand that this will only cover cross-border situations. However, we generally believe that the creation of additional red tape by requiring such notification should be avoided – thereby supporting the Council's approach. In any case, should such notification be required, the letter should cover not only the first but all activities. Otherwise, AIFMs might be constantly required to send pre-marketing notification letters. Lastly, the AIFMD is based on the concept of information exchange between regulators allowing market participants to only communicate with one authority, generally the home state authority of the AIFM. The proposal is not in line with such concept, since it will require that the market participants have to inform both regulators. Inconsistent regulation needs to be avoided.

De-Notification (Art. 93a UCITS-Directive and Art. 32a AIFMD)

The Council proposes to require the achievement of certain thresholds (i.e. number of investors or maximum of assets under management) as pre-condition for a de-notification from marketing activities. The EP has deleted the thresholds originally proposed by the EC in total. In addition, both Council and EP require a blanket offer to repurchase units free of charge as well as the publication of the intention to de-notify.

We support the aim to harmonise de-notification procedures and agree with EP's proposal since there is no objective reason for introducing a threshold to allow de-notification. Investors will be fully protected by either redeeming their shares or units free of charge or if they stay invested by continuously receiving the legally required information. Requiring asset managers to reach a threshold would in fact introduce a new barrier instead of eliminating it. Any threshold might hinder management companies not to enter a market in the first place if they are no longer free to decide to de-notify. Nevertheless, the thresholds foreseen in the Council text are preferable over those in the EC's proposal. If any thresholds should be included, in case of professional investors, management companies should also be able to de-notify if all investors in that jurisdiction agree. With respect to the specific wording, we suggest an alignment with the UCITS- and AIFM-Directive. For the investor there is no difference whether the management companies offer repurchasing the fund or redemption of funds as long as both is free of charge (see the wording in Art. 1 (2) (b) UCITS-Directive). Likewise, as suggested by the EP, the word "de-notification" should replace the term "discontinuation" in order to avoid legal uncertainty since it is the opposite of the term notification which is used for the legal procedure relating to the approval of marketing activities.

Lastly, if the investor has to receive a redemption or repurchase offer, the publication of the intention to de-notify will only be a source of information for other market participants. Since the intention to market is not published, it is doubtful whether it is necessary to publish a de-notification intention. In particular, if funds are placed with professional investors only, such publication requirement creates red tape.

Evaluation / Review (Art. 4a (Council) and Art. 4 (EP) of the amending directive, Art. 14 of the regulation facilitating cross-border distribution (CBDI-R))

Both the Council and the EP foresee an evaluation of the proposal, in particular, the extension of the pre-marketing understanding to UCITS. The EP has also included the request for evaluating the concept of reverse solicitation in the regulation facilitating cross-border distribution.

We generally appreciate a harmonised regime for pre-marketing on a cross-border basis. Such evaluation should – like the general evaluation of this amending directive – include a discussion of rules regarding private placement and reverse solicitation. The concept of pre-marketing is closely related to

these aspects. Currently, investors may easily invest in securities but may only invest in highly regulated funds or at least in funds managed by highly regulated managers, if these are notified for marketing. This should be subject to any review as well. Due to the close link with pre-marketing, we believe it should be subject of the review of the amending directive.

Requirements for Marketing Communication (Art. 2 CBDI-R)

The EP requires that marketing communication should present a detailed account of risks and rewards while Council generally requires presentation of risks and rewards.

While we understand the need for investors to be aware of the risks and also potential benefits of their investments, we do not believe that a detailed account of these should be required in all marketing communications. It is rather important that the investor has the potential to quickly grasp the main risks. In this respect a too detailed presentation may be to the detriment of this objective. Therefore, we suggest to not further specify such information requirement.

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