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2018/0045 (COD)

Proposal for a

**REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL**  
**on facilitating cross-border distribution of collective investment funds and amending**  
**Regulations (EU) No 345/2013 and (EU) No 346/2013**

(Text with EEA relevance)

{SWD(2018) 54 final} - {SWD(2018) 55 final}

## **EXPLANATORY MEMORANDUM**

### **1. CONTEXT OF THE PROPOSAL**

#### **• Reasons for and objectives of the proposal**

The Commission has today adopted a package of measures to deepen the **Capital Markets Union** ('CMU') together with the Communication "Completing Capital Markets Union by 2019 – time to accelerate delivery". The package includes this proposal and a proposal for a Directive amending Directive 2009/65/EC<sup>1</sup> and Directive 2011/61/EU<sup>2</sup> with regard to cross-border distribution of collective investment funds, as well as a proposal for an enabling EU framework on covered bonds, a proposal for an enabling framework on European crowdfunding service providers (ECSP) for businesses, a proposal on the law applicable to the third-party effects of assignments of claims, and a Communication on the applicable law to the proprietary effects of transactions in securities.

This proposal is expected to reduce the cost of going cross-border and should support a more integrated single market for investment funds. Increased competition in the EU will help to give investors more choice and better value.

This proposal was scheduled in the Commission Work Programme 2018<sup>3</sup> and should be seen in the broader context of the **CMU action plan**<sup>4</sup> and the **CMU Mid-Term Review**<sup>5</sup>, to establish a genuine internal capital market by addressing fragmentation in the capital markets, removing regulatory barriers to the financing of the economy and increasing the supply of capital to businesses. Regulatory barriers, namely Member States' marketing requirements, regulatory fees and administrative and notification requirements represent a significant disincentive to the cross-border distribution of funds. These barriers were identified in response to the **Green Paper on Capital Markets Union**<sup>6</sup>, the **Call for Evidence on the EU regulatory framework for financial services**<sup>7</sup> and the **public consultation on barriers to the cross-border distribution of investment funds**<sup>8</sup>.

Investment funds are investment products created with the sole purpose of pooling investors' capital, and investing that capital collectively through a portfolio of financial instruments such as stocks, bonds and other securities. In the EU, investment funds can be categorised as

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<sup>1</sup> Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS), OJ L 302 17.11.2009, p. 32.

<sup>2</sup> Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010, OJ L 174 1.7.2011, p. 1.

<sup>3</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Commission Work Programme 2018 An agenda for a more united, stronger and more democratic Europe (COM(2017)650 final).

<sup>4</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Action Plan on Building a Capital Markets Union (COM(2015)468 final).

<sup>5</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: the Mid-Term Review of the Capital Markets Union Action Plan (COM(2017) 292 final).

<sup>6</sup> Green Paper: Building a Capital Markets Union, COM(2015) 63 final.

<sup>7</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Call for Evidence — EU regulatory framework for financial services, COM(2016) 855 final.

<sup>8</sup> [https://ec.europa.eu/info/publications/consultation-cross-border-distribution-investment-funds\\_en](https://ec.europa.eu/info/publications/consultation-cross-border-distribution-investment-funds_en).

undertakings for collective investment in transferable securities (UCITS) and alternative investment funds (AIFs) managed by alternative investment fund managers (AIFMs). UCITS are covered by Directive 2009/65/EC, and AIFs are covered by Directive 2011/61/EU. Directive 2011/61/EU is complemented by four fund frameworks:

- Regulation (No) 345/2013<sup>9</sup> on European venture capital funds,
- Regulation (No) 346/2013<sup>10</sup> on European social entrepreneurship funds,
- Regulation 2015/760<sup>11</sup> on European long-term investment funds and
- Regulation 2017/1131<sup>12</sup> on money market funds.

The shared purpose of these rules is notably to make cross-border distribution easier while ensuring a high level of investor protection.

Rules for EU investment funds allow managers of investment funds to distribute, and with some exceptions, also to manage their funds across the EU. While EU investment funds have seen rapid growth, with a total of EUR 14 310 billion in assets under management in June 2017<sup>13</sup>, the EU investment fund market is still predominantly organised as a national market: 70 % of all assets under management are held by investment funds authorised or registered for distribution only in their domestic market. Only 37 % of UCITS and about 3 % of AIFs are registered for distribution in more than three Member States. Compared to the United States, the EU market is smaller in terms of assets under management. However, there are considerably more funds in the EU (58 125 in the EU compared to 15 415 in the US)<sup>14</sup>. This means EU funds are on average significantly smaller. This has a negative impact on economies of scale, the fees paid by investors, and the way in which the internal market operates for investment funds.

This proposal also recognises that there are also other factors outside its scope which are holding back the cross-border distribution of investment funds in the EU. These factors include national tax regimes applicable to investment funds and investors, vertical distribution channels and cultural preferences for domestic investment products.

- **Consistency with existing policy provisions in the policy area**

This proposal is presented together with a Directive amending Directive 2009/65/EC and Directive 2011/61/EU with regard to cross-border distribution of collective investment funds. It focuses solely on cross-border distribution of investment funds. It introduces new or amends existing elements of the relevant legislation. These new elements or amendments are consistent with objectives of the existing policy provisions in the policy area, which aim to establish a single market for investment funds and facilitate the cross-border distribution of

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<sup>9</sup> Regulation (EU) No 345/2013 of the European Parliament and of the Council of 17 April 2013 on European venture capital funds (OJ L 115, 25.4.2013, p. 1).

<sup>10</sup> Regulation (EU) No 346/2013 of the European Parliament and of the Council of 17 April 2013 on European social entrepreneurship funds (OJ L 115, 25.4.2013, p. 18).

<sup>11</sup> Regulation (EU) 2015/760 of the European Parliament and of the Council of 29 April 2015 on European long-term investment funds (OJ L 123, 19.5.2015, p. 98-121).

<sup>12</sup> Regulation (EU) 2017/1131 of the European Parliament and of the Council of 14 June 2017 on money market funds (OJ L 169, 30.6.2017, p. 8).

<sup>13</sup> EFAMA, Quarterly Statistical Release Q2 2017.

<sup>14</sup> EFAMA Fact Book 2017 and Investment Company Institute (ICI) Fact Book 2017.

investment funds. The proposal also aligns the rules for different types of investment funds. Hence, consistency with existing policy provisions is safeguarded.

- **Consistency with other Union policies**

The Commission's top priority is to strengthen the EU economy and stimulate investment to create jobs. A key element of the **Investment Plan for Europe**<sup>15</sup>, which aims to strengthen Europe's economy and encourage investment in all 28 Member States, is creating a deeper single market for capital – a **CMU**. Deeper and integrated capital markets will improve the access to capital for companies while aiding in the development of new investment opportunities for savers.

This proposal is complementary to this objective and a **priority action in the CMU mid-term review**<sup>16</sup>, as it contains measures to remove capital market barriers. It contributes to the development of more integrated capital markets by making it easier for investors, fund managers and invested undertakings to benefit from the single market.

## **2. LEGAL BASIS, SUBSIDIARITY AND PROPORTIONALITY**

- **Legal basis**

This proposal falls within the area of shared competence in accordance with Article 4(2)(a) of the Treaty on the Functioning of the European Union (TFEU).

The legal basis for action is Article 114 TFEU. The choice of this legal base reflects the crucial role that a harmonised passporting regime plays in the operating of an internal market for investment funds.

It is vital to make it easier for investment funds to provide services and thus to achieve a more competitive and integrated internal market within the Union. Regulatory barriers to cross-border distribution currently prevent the internal market for investment funds from operating properly. The regulatory barriers fragment the internal market and make it difficult for investment funds to fully benefit from the internal market. Therefore, to ensure that the internal market for investment funds operates properly and to improve the conditions in which it operates, a regulatory framework that reduces barriers to the cross-border distribution of investment funds at Union level is necessary. That is why the proposal aims to harmonise the behavioural requirements for investment funds, i.e. marketing communications to potential investors, and transparency of the provisions falling outside the fields governed by Directive 2009/65/EC and Directive 2011/61/EU, thus allowing for the facilitation of a cross-border passport mechanism.

- **Subsidiarity (for non-exclusive competence)**

This proposal complies with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union (TEU).

Harmonising EU rules on marketing communications to potential investors and bringing more transparency to the provisions falling outside the fields can be conducive to the development

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<sup>15</sup> <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1507119651257&uri=CELEX:52014DC0903>

<sup>16</sup> Further initiatives also target the facilitation of cross-border investments, e.g. guidance on existing EU standards for the treatment of cross-border EU investments and the amicable resolution of investment disputes.

of more integrated capital markets for investment funds throughout the Union. The aim of the proposal is thus to ensure that the internal market for the services of investment funds operates smoothly. This is not limited to the territory of one Member State and cannot be achieved by the Member States at national level. Also, the proposal creates additional tasks for the European Securities and Markets Authority (ESMA) established under Regulation (EU) No 1095/2010<sup>17</sup> which cannot be achieved by Member States acting individually.

- **Proportionality**

This proposal complies with the principle of proportionality as set out in Article 5 TEU.

The impact assessment contains initial estimations on cost savings based on factual and realistic assumptions. The proposal will reduce the compliance burden and costs for investment funds by increasing transparency. Although the development and maintenance of ESMA databases require input from the competent authorities in the Member States (notably notifications to ESMA), the financial efforts expected from Member States will be limited. The data gathered will allow ESMA to better perform its convergence role. Increased competition in the investment funds sector will have a positive effect on the choice available to investors and on Member States' economies.

- **Choice of the instrument**

This proposal includes provisions which give investment funds more legal certainty to provide services. The lack of transparency of regulatory barriers observed in Member States would not be solved solely by amending Directive 2009/65/EC and Directive 2011/61/EU, as this could give rise to an uneven implementation.

Moreover, those rules proposed in this Regulation which addressed to ESMA and the national authorities, are technical in nature and self-standing. The proposal aims to increase transparency on the rules and procedures applicable to (cross-border) marketing of investment funds and regulatory fees and charges levied by national competent authorities. A directly applicable regulation, providing full harmonisation, is necessary to achieve these policy objectives. A regulation is also a suitable legal means to task ESMA to develop and maintain databases on national marketing communication rules, applicable fees and charges as well as for storing notifications. A Regulation, therefore, should best deliver maximum harmonisation avoiding divergences and thus ensuring greater regulatory convergence.

It is also proposed to introduce limited changes to Regulation (EU) No 345/2013 and Regulation (No) 346/2013 to mirror an introduction of the notion and conditions for pre-marketing in a separate directive proposing amendments to Directive 2011/61/EU. Amendments to the Regulations therefore must be introduced by a Regulation.

In addition, it is proposed to introduce limited changes to Directive 2009/65/EC and Directive 2011/61/EU with regard to cross-border distribution of collective investment funds. For this purpose, this proposal is presented together with a Directive amending those Directives (which is proposed separately).

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<sup>17</sup> Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC (OJ L 331, 15.12.2010, p. 84).

### 3. RESULTS OF EX-POST EVALUATIONS, STAKEHOLDER CONSULTATIONS AND IMPACT ASSESSMENTS

- **Ex-post evaluations/fitness checks of existing legislation**

In preparing this proposal, the Commission has carried out an in-depth evaluation of relevant provisions of Directive 2009/65/EC and Directive 2011/61/EU and additional requirements imposed by Member States.

This evaluation showed that despite its relative success, the single market falls short of realising its full potential for the cross-border distribution of investment funds since the funds still face many barriers. In addition, the legal requirements and administrative practices which fall outside the harmonisation introduced by Directive 2009/65/EC and Directive 2011/61/EU lack transparency. The Commission's evaluation revealed that Member States take very different approaches to the requirements and verifications of marketing communications. There is also a wide variation in the fees and charges levied by the national competent authorities for supervisory tasks in accordance with Directive 2009/65/EC and Directive 2011/61/EU. These are all barriers to a wider cross-border distribution of investment funds.

- **Stakeholder consultations**

Responses to two consultations suggested that regulatory barriers to the cross-border distribution of investment funds prevented the full benefits of the single market from being realised. The first consultation, the **Green Paper on Capital Markets Union**, was launched on 18 February 2015. The second consultation, the **Call for Evidence on the EU regulatory framework for financial services**, was launched on 30 September 2015.

**Additional information** on national practices was sought **from competent authorities and ESMA**. At the Commission's request, ESMA conducted a survey of competent authorities in 2016, requesting details about current national practices in areas such as regulatory fees and marketing requirements.

Based on the input received from the CMU Green Paper and the Call for Evidence and ESMA's survey, the Commission launched a **public consultation** on 2 June 2016 **on the cross border distribution of investment funds**<sup>18</sup>. Given the feedback already received, the consultation sought practical examples of the problems faced and evidence of their impact. To receive a high number of replies, the Commission organised **roadshows** with asset management associations and their members in the main asset management hubs in the EU, i.e. Luxembourg, France, Ireland, the UK, Germany and Belgium. Several meetings and conference calls were held with European and national investor associations, and the consultation was presented to the **Financial Services User Group** on 15 September 2016. In total, 64 responses were received: 52 from associations or companies, 8 from public authorities or international organisations and 4 from individuals. Most responses indicated that regulatory barriers were a significant disincentive to cross-border distribution.

At the Commission's request and based on the evidence received, ESMA conducted a **follow-up survey** in 2017 to obtain further information about specific marketing practices and notification requirements in Member States.

The Commission also organised meetings with the investment fund industry and European investor associations for more information. A **questionnaire** was sent on 30 May 2017 to

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<sup>18</sup> [https://ec.europa.eu/info/publications/consultation-cross-border-distribution-investment-funds\\_en](https://ec.europa.eu/info/publications/consultation-cross-border-distribution-investment-funds_en) .

eight trade bodies on the various areas covered by the cross-border distribution of investment funds. There was a particular focus on quantifying the costs caused by the regulatory barriers to cross-border distribution and determining the potential benefits of removing these barriers for asset managers and investors. Feedback suggested that the costs due to regulatory barriers are substantial: they amount to 1 to 4 % of the overall expenses of an investment fund. Also, a **targeted survey** of 60 equally represented small, medium-sized and large investment funds based on a randomised stratified sampling procedure was conducted in October 2017. The survey confirmed the relevance of the regulatory barriers and the need for action at EU level.

The Commission also consulted stakeholders in June and July 2017 through an **inception impact assessment**<sup>19</sup>. The five responses received from asset managers, their associations and financial advisors' associations supported the Commission initiative to reduce the barriers to the cross-border distribution of investment funds.

- **Collection and use of expertise**

The Commission relied on information and data from Morningstar<sup>20</sup>, the European Fund and Asset Management Association (EFAMA) and market reports and studies by private companies. Additionally, academic literature was reviewed, in particular literature on the impact of cross-border distribution on competition and expected consumer behaviour.

- **Impact assessment**

An impact assessment was carried out to prepare this initiative.

On 1 December 2017, the Regulatory Scrutiny Board delivered a positive opinion with recommendations to further improve the draft impact assessment report. The draft report was subsequently modified to take into account the Board's comments<sup>21</sup>. The main changes recommended by the Board related to:

- factors that affect cross-border distribution not covered by the initiative,
- a description in the baseline of recent initiatives that have an (indirect) impact on the cross-border distribution of funds,
- the structure, presentation, assessment and comparison of the options and
- the presentation, documentation and the qualification of the quantitative methods and their results.

The revised impact assessment report and an executive summary of the impact assessment report are published with this proposal<sup>22</sup>.

The impact assessment report considers a range of policy options. Based on their assessment, the policy choices are as follows:

- (a) National marketing requirements should be more transparent at national and EU level. In addition, the definition of pre-marketing in Directive 2011/61/EU should be

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<sup>19</sup> [https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2017-3132069\\_en](https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2017-3132069_en).

<sup>20</sup> Morningstar is an investment research and data provider.

<sup>21</sup> The opinion of the Regulatory Scrutiny Board SEC(2018)129 final.

<sup>22</sup> The Impact Assessment report and the Executive summary SWD(2018)54 final and SWD(2018)55 final.

harmonised, and the process of checking marketing material should be framed more clearly.

- (b) Regulatory fees should be more transparent at EU level, and high-level principles should be introduced to ensure more consistency in the way regulatory fees are determined.
- (c) The choice of facilities to support local investors should be left to managers of investment funds, with safeguards for investors.
- (d) The procedures and requirements for updating notifications and de-notification of the use of the marketing passport should be harmonised more.

Together, the policy choices significantly reduce regulatory barriers. They increase the potential to have more funds marketed cross-border, improve competition, lower market fragmentation and give investors more choice in the EU. The policy choices also have indirect benefits because of their social and environmental impact. More cross-border distribution should lead to more opportunities to invest in investment funds pursuing social or environmental goals. This in turn could accelerate growth in these areas.

For all investment funds currently marketed on a cross-border basis in the EU, the policy choices together are expected to save an annual EUR 306 to 440 million in costs (recurrent costs). The savings in one-off costs is expected to be even higher: EUR 378 to 467 million. These cost reductions should act as incentives to develop more cross-border activities and support a more integrated single market for investment funds.

This Regulation covers policy choices (a) and (b). The Directive amending Directive 2009/65/EC and Directive 2011/61/EU which is proposed separately covers policy choices (c) and (d).

- **Regulatory fitness and simplification**

This proposal should lead to significant cost reductions for managers of investment funds that distribute, or intend to distribute, their funds cross-border in the EU. These cost reductions will in particular have a positive effect on managers of funds who either manage a smaller number of investment funds or investment funds with less significant assets under management, since they have a smaller base over which they can spread the costs.

Although this proposal does not directly target small and medium sized enterprises (SMEs), the SMEs will indirectly benefit from this proposal. Increased cross-border distribution of investment funds will in fact accelerate the growth of EU investment funds and their investments in SMEs, in particular from venture capital funds.

- **Fundamental rights**

The EU is committed to high standards of protection of fundamental rights. In this context, the proposal is not likely to have a direct impact on those rights, as listed in the Charter of Fundamental Rights of the European Union.

#### **4. BUDGETARY IMPLICATIONS**

This proposal will have two budgetary implications for ESMA. ESMA will have to:

- prepare regulatory and implementing technical standards, and
- develop and maintain databases that the public can use for free.



The specific budgetary implications for ESMA are assessed in the financial statement accompanying this proposal.

Pending the recent review of the European Supervisory Authorities, the proposal has implications for the Union budget in the form of the Commission's 40 % share in financing ESMA.

## **5. OTHER ELEMENTS**

### **• Evaluation**

An evaluation of this Regulation and the proposal for a Directive amending Directive 2009/65/EC and 2011/61/EU with regard to cross-border distribution of collective investment funds will be conducted five years after the entry into force of this Regulation. The Commission will rely on a public consultation and discussions with ESMA and competent authorities.

### **• Detailed explanation of the specific provisions of the proposal**

Article 1 introduces the definitions.

Article 2 on requirements on marketing communications contains principles which marketing communications must fulfil, namely (i) the communications are identifiable as such, (ii) present the risks and rewards of purchasing units or shares of AIFs and UCITS in an equally prominent manner and (iii) all information included in marketing communications is fair, clear and not misleading. It is broadly based on Article 77 of Directive 2009/65/EC and extends the scope of application to Directive 2011/61/EU.

Articles 3 and 4 introduce a transparency framework for national provisions on marketing requirements. The competent authorities will publish online all applicable national laws, regulations and administrative provisions governing marketing rules for AIFs and UCITS, and their summaries, in at least a language customary in the sphere of international finance, requesting the publication in that language next to the official languages or one of the official languages used in a given Member State. ESMA will be notified of this information and will publish and maintain on its website a dedicated central database. To streamline the information flows between the competent authorities and ESMA, Article 3 lays down an empowerment for implementing technical standards to determine standard forms, templates and procedures for the notifications.

Under Article 5, where competent authorities require systematic notification of marketing communications in order to verify compliance of such communications with relevant national provisions on marketing requirements, the competent authorities must decide within 10 working days. The verification may not constitute a prior condition for marketing. Article 5 also establishes that the competent authorities must apply and publish applicable procedures ensuring transparent and non-discriminatory treatment regardless of the origin of the verified investment fund. The competent authorities each year must inform ESMA of the decisions rejecting or requesting adaptations to marketing communications. To ensure a coherent treatment of retail investors, these requirements should also be applied by AIFMs where Member States allow them to market units or shares of AIFs to retail investors in their territories.

Article 6 lays down that where the competent authority levies fees or charges, such fees or charges must be proportionate to supervisory tasks carried out, and the relevant invoices must be sent to the registered offices of the AIFMs or UCITS management companies.

Article 7 sets out that the competent authorities have to publish and maintain on their websites central databases on the fees or charges or relevant calculation methodologies. The information is to be made available in at least a language customary in the sphere of international finance. The system provides for notifications by competent authorities of the relevant information. To streamline the information flows between the competent authorities and ESMA, ESMA must develop implementing technical standards to determine standard forms, templates and procedures for the notifications.

Article 8 entrusts ESMA with the task of publishing and maintaining online an interactive central database with the fees or charges charged by the competent authorities, or, where applicable, with the calculation methodologies used.

Article 9, as part of the interactive central database introduced by Article 8, provides for an interactive tool on fees and charges that allows the user to perform online calculations.

Article 10 introduces a requirement on ESMA to publish and maintain on its website a central database on all AIFMs, UCITS management companies, AIFs and UCITS. This database builds on information received by ESMA in accordance with Article 6(1) of Directive 2009/65/EC and Article 7(5) of Directive 2011/61/EU and notifications and notification letters received by the competent authorities under those Directives, as notified to ESMA in accordance with Article 11(1) of this Regulation.

Under Article 11 the competent authorities are required to transmit notifications and notification letters referred to in Article 10 to ESMA. To standardise and streamline the information flows between investment funds/AIFMs or UCITS management companies and the competent authorities and the competent authorities and ESMA, this Article also lays down an empowerment for regulatory and implementing technical standards.

Articles 12 and 13 introduce the concept of pre-marketing in Regulation (EU) No 345/2013 and Regulation (EU) No 346/2013. The change would allow managers registered in accordance with those Regulations to target investors by testing their appetite for upcoming investment opportunities or strategies through pre-marketing. This change would warrant a level playing field with managers authorised under Article 6 of Directive 2011/61/EU benefiting from that concept introduced by [*reference a Directive amending Directive 2009/65/EC and Directive 2011/61/EU with regard to cross-border distribution of collective investment funds*].

Article 14 lays down 60 months after the date for entry into force of this Regulation the Commission shall carry out an evaluation of this Regulation.

Proposal for a

**REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL**

**on facilitating cross-border distribution of collective investment funds and amending Regulations (EU) No 345/2013 and (EU) No 346/2013**

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 114 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Central Bank,

Having regard to the opinion of the European Economic and Social Committee,<sup>23</sup>

Acting in accordance with the ordinary legislative procedure,

Whereas:

- (1) Divergent regulatory and supervisory approaches concerning the cross-border distribution of alternative investment funds ('AIFs'), as defined in Article 4(1)(a) of Directive 2011/61/EU of the European Parliament and of the Council<sup>24</sup>, and undertakings for collective investment in transferable securities ('UCITS'), within the meaning of Directive 2009/65/EC of the European Parliament and of the Council<sup>25</sup>, result in fragmentation and barriers to cross-border marketing and access of AIFs and UCITS, which in turn could prevent them from being marketed in other Member States.
- (2) In order to enhance the regulatory framework applicable to investment funds and to better protect investors, marketing communications to investors in AIFs and UCITS should be identifiable as such, and should present risks and rewards of purchasing units or shares of an AIF or UCITS in an equally prominent manner. In addition, all information included in marketing communications should be presented in a manner that is fair, clear and not misleading. To safeguard investors' protection and secure a level playing field between AIFs and UCITS, the standards for marketing

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<sup>23</sup> OJ C , , p. .

<sup>24</sup> Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010 (OJ L 174, 1.7.2011, p. 1).

<sup>25</sup> Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) (OJ L 302, 17.11.2009, p. 32).

communications should therefore equally apply to marketing communications for AIFs and UCITS.

- (3) Competent authorities that decide to require systematic notification of marketing communications should verify compliance of those communications with this Regulation and other applicable requirements, namely whether the marketing communications are identifiable as such, whether they present risks and rewards of purchasing units or shares of a UCITS and, where a Member State allows marketing of AIFs to retail investors, of an AIF in an equally prominent manner and whether all information in marketing communications is presented in a manner that is fair, clear and not misleading.
- (4) To enhance transparency and investor protection, access to information on marketing requirements for shares or units of AIFs or UCITS enshrined in national laws, regulations and administrative provisions should be improved by requiring competent authorities and the European Securities and Markets Authority ('ESMA') to maintain central databases on their websites in at least a language customary in the sphere of international finance.
- (5) To ensure equality in treatment and facilitate decision-making of AIFMs and UCITS management companies whether to engage in cross border distribution of investment funds, it is important that fees and charges levied by competent authorities for the authorisation, registration and supervision referred to in Directives 2009/65/EC and 2011/61/EU are proportionate to the supervisory tasks carried out and publicly disclosed, and that those fees and charges are published on their websites. For the same reason, the ESMA website should include an interactive tool enabling calculations of fees and charges levied by competent authorities
- (6) Since ESMA, in accordance with Regulation (EU) No 1095/2010 of the European Parliament and of the Council<sup>26</sup>, should monitor and assess market developments in the area of its competence, it is appropriate and necessary to enhance the knowledge of ESMA by enlarging ESMA's currently existing databases to include all AIFMs and UCITS management companies and all AIFs and UCITS which those management companies manage and market, as well as all the Member States in which those investment funds are marketed. For that purpose, competent authorities should transmit to ESMA notifications, notification letters or written notices that they received under Directives 2009/65/EC and 2011/61/EU.
- (7) In order to secure a level playing field between qualifying venture capital funds as defined in Article 3(b) of Regulation (EU) No 345/2013 of the European Parliament and of the Council<sup>27</sup>, or qualifying social entrepreneurship funds as defined in Article 3(b) of Regulation (EU) No 346/2013 of the European Parliament and of the Council,<sup>28</sup> on the one hand, and other AIFs, on the other hand, it is necessary to include into those Regulations rules on pre-marketing that are identical to the rules laid down in Directive 2011/61/EU on pre-marketing. Those rules should enable

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<sup>26</sup> Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC (OJ L 331, 15.12.2010, p. 84).

<sup>27</sup> Regulation (EU) No 345/2013 of the European Parliament and of the Council of 17 April 2013 on European venture capital funds (OJ L 115, 25.4.2013, p. 1).

<sup>28</sup> Regulation (EU) No 346/2013 of the European Parliament and of the Council of 17 April 2013 on European social entrepreneurship funds (OJ L 115, 25.4.2013, p. 18).

managers registered in accordance with those Regulations to target investors by testing their appetite for upcoming investment opportunities or strategies through qualifying venture capital funds and qualifying social entrepreneurship funds.

- (8) The Commission should be empowered to adopt draft regulatory technical standards, developed by ESMA, with regard to the specification of information on fees or charges or, where applicable, relevant calculation methodologies for those fees or charges, levied by the competent authorities. Furthermore, the Commission should be empowered to adopt draft regulatory technical standards, developed by ESMA, with regard to the specification of information to be notified in notifications, notification letters and written notices on cross-border activities that are required by Directives 2009/65/EC and 2011/61/EU. The Commission should adopt those draft regulatory technical standards by means of delegated acts pursuant to Article 290 TFEU and in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010.
- (9) The Commission should be empowered to adopt implementing technical standards, developed by ESMA, with regard to the standard forms, templates and procedures for notifications by competent authorities of the laws, regulations and administrative provisions and their summaries on marketing requirements applicable in their territories, the levels of fees or charges levied by them, and, where applicable, relevant calculation methodologies. Furthermore, to improve the transmission of information to competent authorities and among competent authorities and ESMA, implementing technical standards should cover notifications, notification letters and written notices on cross-border activities that are required by Directives 2009/65/EC and 2011/61/EU. The Commission should adopt those implementing technical standards by means of implementing acts pursuant to Article 291 TFEU and in accordance with Article 15 of Regulation (EU) No 1095/2010.
- (10) It is necessary to coordinate the empowerments granted to the Commission to adopt draft regulatory technical standards and implementing technical standards, as developed by ESMA, in the area of notifications, notification letters or written notices on cross-border activities under this Regulation and under Directives 2009/65/EC and 2011/61/EU. [*Directive amending Directive 2009/65/EC and Directive 2011/61/EU with regard to cross-border distribution of collective investment funds*] should therefore delete those empowerments from Directives 2009/65/EC and 2011/61/EU.
- (11) Any processing of personal data carried out within the framework of this Regulation, such as the exchange or transmission of personal data by the competent authorities, should be undertaken in accordance with Regulation (EU) 2016/679 of the European Parliament and of the Council<sup>29</sup>, and any exchange or transmission of information by ESMA should be undertaken in accordance with Regulation (EC) No 45/2001 of the European Parliament and of the Council<sup>30</sup>.
- (12) Five years after the entry into force of this Regulation, the Commission should conduct an evaluation of the application of this Regulation. The evaluation should take

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<sup>29</sup> Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (OJ L 119, 4.5.2016, p. 1).

<sup>30</sup> Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data (OJ L 8, 12.1.2001, p. 1).

account of market developments and assess whether the measures introduced have improved the cross-border distribution of investment funds.

- (13) In order to ensure legal certainty, it is necessary to synchronise the application dates of laws, regulations and administrative provisions implementing [*Directive amending Directive 2009/65/EC and Directive 2011/61/EU with regard to cross-border distribution of collective investment funds*] and of this Regulation with regard to provisions on marketing communications and pre-marketing.
- (14) Since the objectives of this Regulation, namely to enhance market efficiency while establishing the Capital Markets Union, cannot be sufficiently achieved by the Member States but can rather, by reason of its effects, be better achieved at Union level, the Union may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality as set out in that Article, this Regulation does not go beyond what is necessary in order to achieve those objectives,

HAVE ADOPTED THIS REGULATION:

### *Article 1*

#### **Definitions**

For the purposes of this Regulation, the following definitions apply:

- (a) ‘AIF’ means an AIF as defined in Article 4(1)(a) of Directive 2011/61/EU;
- (b) ‘AIFM’ means an AIFM as defined in Article 4(1)(b) of Directive 2011/61/EU;
- (c) ‘competent authority’ means a competent authority as defined in Article 2(1)(h) of Directive 2009/65/EC or a competent authority as defined in Article 4(1)(f) of Directive 2011/61/EU or Article 4(1)(h) of Directive 2011/61/EU;
- (d) ‘home Member State’ means the Member State in which the AIFM or the UCITS management company has its registered office;
- (e) ‘UCITS’ means a UCITS authorised in accordance with Article 5 of Directive 2009/65/EC;
- (f) ‘UCITS management company’ means a management company as defined in Article 2(1)(b) of Directive 2009/65/EC.

### *Article 2*

#### **Requirements for marketing communications**

1. AIFMs or UCITS management companies shall ensure that all marketing communications to investors shall be identifiable as such, present risks and rewards of purchasing units or shares of an AIF or of an UCITS in an equally prominent manner and that all information included in marketing communications is fair, clear and not misleading.
2. UCITS management companies shall ensure that no marketing communication that contains specific information about a UCITS contradicts the information, or diminishes its significance, contained in the prospectus referred to in Article 68 of Directive 2009/65/EC and the key investor information referred to in Article 78 of that Directive. UCITS management companies shall ensure that all marketing communications indicate that a prospectus exists and that the key investor

information is available. The marketing communication shall specify where, how and in which language investors or potential investors can obtain the prospectus and the key investor information.

3. AIFMs shall ensure that no marketing communication comprising an invitation to purchase units or shares of an AIF that contains specific information about an AIF makes any statement that contradicts the information that needs to be disclosed to the investors in accordance with Article 23 of Directive 2011/61/EU, or diminishes its significance.
4. Paragraph 2 of this Article shall apply *mutatis mutandis* to AIFs which publish a prospectus in accordance with Regulation 2017/1129 of the European Parliament and the Council,<sup>31</sup> or in accordance with national law, or apply rules on the format and content of the key investor information referred to in Article 78 of Directive 2009/65/EC.
5. By [PO: *Please insert date 24 months after the date of entry into force*] ESMA shall issue guidelines, and thereafter update those guidelines periodically, on the application of the requirements for marketing communications referred to in the first paragraph, taking into account on-line aspects of marketing communications.

### *Article 3*

#### **Publication of national provisions concerning marketing requirements**

1. Competent authorities shall publish and maintain on their websites central databases containing all applicable national laws, regulations and administrative provisions governing marketing requirements for AIFs and UCITS, and the summaries thereof, in at least a language customary in the sphere of international finance.
2. Competent authorities shall notify to ESMA the laws, regulations and administrative provisions, and the summaries thereof, referred to in paragraph 1 and the hyperlinks to the websites of competent authorities where that information is published.  
  
Competent authorities shall notify to ESMA any change in the information provided under the first subparagraph of this paragraph without delay.
3. ESMA shall develop draft implementing technical standards to determine standard forms, templates and procedures for the notifications under this Article.  
  
ESMA shall submit those draft implementing standards to the Commission by [PO: *Please insert date 18 months after the date of entry into force*].  
  
Power is conferred on the Commission to adopt the implementing technical standards referred to in the first subparagraph in accordance with Article 15 of Regulation (EU) No 1095/2010.
4. By [PO: *Please insert date 48 months after the date of entry into force*] ESMA shall examine in a report the marketing requirements referred to in paragraph 1 and inform the Commission thereof. ESMA shall update that report every two years.

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<sup>31</sup> Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Directive 2003/71/EC (OJ L 168, 30.6.2017, p. 12).

#### Article 4

##### **ESMA central database on national provisions concerning marketing requirements**

By [PO: Please insert date 30 months after the date of entry into force], ESMA shall publish and maintain on its website a central database containing the national laws, regulations and administrative provisions concerning marketing requirements, and the summaries thereof, and the hyperlinks to the websites of competent authorities.

#### Article 5

##### **Verification of marketing communications**

1. For the sole purpose of verifying compliance with this Regulation and with national provisions concerning marketing requirements, competent authorities may require systematic notification of marketing communications which the UCITS management companies intend to use directly or indirectly in their dealings with investors.

The systematic notification referred to in the first subparagraph shall not constitute a prior condition for the marketing of units of UCITS.

Where competent authorities require notification of marketing communications referred to in the first subparagraph, they shall, within 10 working days, starting on the working day following that of the receipt of a notification, inform the UCITS management company of any request to amend its marketing communications.

2. Competent authorities that require systematic notification of marketing communications shall establish, apply, and publish on their websites, procedures for the systematic notification of marketing communications. The internal rules and procedures shall ensure transparent and non-discriminatory treatment of all UCITS, regardless of the Member States in which the UCITS are authorised.
3. Where Member States allow AIFMs to market to retail investors units or shares of AIFs in their territories, paragraphs 1 and 2 of this Article shall apply *mutatis mutandis* to those AIFMs.
4. Competent authorities that require systematic notification of marketing communications as referred to in paragraph 1 shall, by 31 March of each year, report to ESMA on the decisions taken in the preceding year rejecting or requesting adaptations to marketing communications.

The report to ESMA shall include the following information:

- (a) the total number of decisions taken, clearly distinguishing the most frequent breaches, including the description of the subject matter;
- (b) the outcomes of each decision;
- (c) one concrete example for each of the breaches referred to in point (a).

By 30 June of each year, ESMA shall submit a report to the Commission analysing the effects of national laws, regulations and administrative provisions governing marketing communications.

#### Article 6

##### **Common principles concerning fees or charges**



1. Fees or charges levied by competent authorities shall be proportionate to the expenditure relating to the authorisation or registration and the performance of the supervisory and investigatory powers pursuant to Articles 44, 45 and 46 of Directive 2011/61/EU and Articles 97 and 98 of Directive 2009/65/EC.
2. Competent authorities shall send an invoice for the given financial year to the registered office of the AIFM or UCITS management company. The invoice shall indicate the fees or charges referred to in paragraph 1, the means of payment and the date when payment is due.

#### Article 7

##### **Publication of national provisions concerning fees and charges**

1. By [*PO: Please insert date 6 months after the date of entry into force*], competent authorities shall publish and maintain on their websites central databases listing the fees or charges referred to in Article 6(1), or, where applicable, the calculation methodologies for those fees or charges, in at least a language customary in the sphere of international finance.
2. Competent authorities shall notify to ESMA the levels of fees or charges referred to in Article 6(1), and where applicable, the calculation methodologies for those fees or charges.

Competent authorities shall notify to ESMA any change in the information provided under the first subparagraph without delay.

3. ESMA shall develop draft regulatory technical standards to specify the information to be notified to ESMA by the competent authorities under this Article.

ESMA shall submit those draft regulatory technical standards to the Commission by [*PO: Please insert date 18 months after the date of entry into force*].

Power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010.

4. ESMA shall develop draft implementing technical standards to determine the standard forms, templates and procedures for the notifications under this Article.

ESMA shall submit those draft implementing standards to the Commission by [*PO: Please insert date 18 months after the date of entry into force*].

Power is conferred on the Commission to adopt the implementing technical standards referred to in the first subparagraph in accordance with Article 15 of Regulation (EU) No 1095/2010.

#### Article 8

##### **ESMA interactive database on fees and charges**

By [*PO: Please insert date 30 months after the date of entry into force*] ESMA shall publish and maintain on its website an interactive database, publicly accessible in at least a language customary in the sphere of international finance, listing the fees or charges referred to in Article 6(1), or, where applicable, the calculation methodologies for those fees or charges.

The interactive database shall contain the hyperlinks to the websites of competent authorities referred to in Article 7(1).

## Article 9

### **ESMA interactive tool on fees and charges**

By [*PO: Please insert date 30 months after the date of entry into force*] ESMA shall develop, make available and maintain on its website an interactive tool publicly accessible in at least a language customary in the sphere of international finance presenting the fees and charges referred to in Article 6(1).

The interactive tool shall constitute a part of the interactive database referred to in Article 8.

## Article 10

### **ESMA central database on AIFMs, UCITS management companies, AIFs and UCITS**

By [*PO: Please insert date 30 months after the date of entry into force*] ESMA shall publish and maintain on its website a central database, publicly accessible in a language customary in the sphere of international finance, listing all AIFMs, UCITS management companies, AIFs and UCITS which those AIFMs and UCITS management companies manage and market, as well as the Member States in which those funds are marketed.

## Article 11

### **Standardisation of notifications to ESMA**

1. The competent authorities of the home Member States shall transmit to ESMA any notification, any notification letter, any written notice or any information referred to in paragraphs 3 and 8 of Article 17, paragraphs 2 and 4 of Article 18, paragraphs 3 and 8 of Article 93 and Article 93a(3) of Directive 2009/65/EC and paragraphs 2 and 4 of Article 31, paragraphs 3 and 7 of Article 32, Article 32a(3) and paragraphs 2 and 3 of Article 33 of Directive 2011/61/EU without delay.

2. ESMA shall develop draft regulatory technical standards to specify information to be notified in accordance with paragraphs 1, 2, 3, 8 and 9 of Article 17, paragraphs 1, 2 and 4 of Article 18, paragraphs 1, 2 and 8 of Article 93 and Article 93a(2) of Directive 2009/65/EC and Article 32a(2) and paragraphs 2, 3 and 6 of Article 33 of Directive 2011/61/EU.

ESMA shall submit those draft regulatory technical standards to the Commission by [*PO: Please insert date 18 months after the date of entry into force*].

Power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010.

3. ESMA shall develop draft implementing technical standards to specify the forms, templates and procedures for the transmission of the information referred to in paragraphs 1, 2, 3, 8 and 9 of Article 17, paragraphs 1, 2 and 4 of Article 18, paragraphs 1, 2 and 8 of Article 93 and Article 93a(2) of Directive 2009/65/EC and paragraphs 2 and 4 of Article 31, paragraphs 2 and 7 of Article 32, Article 32a(2) and paragraphs 2, 3 and 6 of Article 33 of Directive 2011/61/EU, including the procedure of transmission of the information by the competent authorities for the purposes of paragraph 1.

ESMA shall submit those draft implementing technical standards to the Commission by [*PO: Please insert date 18 months after the date of entry into force of this Regulation*].

Power is conferred on the Commission to adopt the implementing technical standards referred to in the first subparagraph of this paragraph in accordance with Article 15 of Regulation (EU) No 1095/2010.

#### *Article 12*

#### **Amendments to Regulation (EU) No 345/2013 on European venture capital funds**

Regulation (EU) No 345/2013 is amended as follows:

(1) in Article 3, the following point (o) is added:

‘(o) ‘pre-marketing’ means a direct or indirect provision of information on investment strategies or investment ideas by the manager of a qualifying venture capital fund, or on its behalf, to potential investors domiciled or with a registered office in the Union in order to test their interest in a not yet registered qualifying venture capital fund’;

(2) the following Article 4a is inserted:

#### *‘Article 4a*

1. Managers of qualifying venture capital funds may engage in pre-marketing in the Union, excluding where the information presented to potential investors:

- (a) relates to established qualifying venture capital funds;
- (b) contains any reference to established qualifying venture capital funds;
- (c) enables investors to commit to acquiring units or shares of particular qualifying venture capital funds;
- (d) amounts to a prospectus, constitutional documents of not yet registered qualifying venture capital funds, offering documents, subscription forms or similar documents whether in a draft or a final form allowing investors to take an investment decision.

2. Competent authorities shall not require managers of qualifying venture capital funds to notify their intention to engage in pre-marketing.

3. Subscription by investors to units or shares of qualifying venture capital funds registered following the pre-marketing in accordance with paragraph 1 or to the units or shares of qualifying venture capital funds managed and marketed by managers of qualifying venture capital funds that engaged in pre-marketing of not yet registered qualifying venture capital funds with the similar features shall be considered the result of marketing.

4. Managers of qualifying venture capital funds offering for subscription units or shares of qualifying venture capital funds that were the object of pre-marketing shall inform the competent authority in accordance with Article 15.’

#### *Article 13*

#### **Amendments to Regulation (EU) No 346/2013 on European social entrepreneurship funds**

Regulation (EU) No 346/2013 is amended as follows:

(1) in Article 3, the following point (o) is added:

‘(o) ‘pre-marketing’ means a direct or indirect provision of information on investment strategies or investment ideas by the manager of a qualifying social entrepreneurship fund, or on its behalf, to potential investors domiciled or with a registered office in the Union in order to test their interest in a not yet registered qualifying social entrepreneurship fund’;

(2) the following Article 4a is inserted:

*‘Article 4a*

1. Managers of qualifying social entrepreneurship funds may engage in pre-marketing in the Union, excluding where the information presented to potential investors:

- (a) relates to established qualifying social entrepreneurship funds;
- (b) contains any reference to established qualifying social entrepreneurship funds;
- (c) enables investors to commit to acquiring units or shares of particular qualifying social entrepreneurship funds;
- (d) amounts to a prospectus, constitutional documents of not yet registered qualifying social entrepreneurship funds, offering documents, subscription forms or similar documents whether in a draft or a final form allowing investors to take an investment decision.

2. Competent authorities shall not require managers of qualifying social entrepreneurship funds to notify their intention to engage in pre-marketing.

3. Subscription by investors to units or shares of qualifying social entrepreneurship funds registered following the pre-marketing in accordance with paragraph 1 or to the units or shares of qualifying social entrepreneurship funds managed and marketed by managers of qualifying social entrepreneurship funds that engaged in pre-marketing of not yet registered qualifying social entrepreneurship funds with the similar features shall be considered the result of marketing.

4. Managers of qualifying social entrepreneurship funds offering for subscription units or shares of qualifying social entrepreneurship funds that were the object of pre-marketing shall inform the competent authority in accordance with Article 16.’

*Article 14*

**Evaluation**

By [*PO: Please insert date 60 months after the date of entry into force*] the Commission shall, on the basis of a public consultation and in light of discussions with ESMA and competent authorities, conduct an evaluation of the application of this Regulation.

*Article 15*

**Entry into force**

This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

It shall apply from [*PO: Please insert the twentieth day following that of its publication in the Official Journal of the European Union*], except for paragraphs 1 and 4 of Article 2,

paragraph 1 and 2 of Article 3, Article 12 and Article 13, which shall apply from [*PO: Please insert date 24 months after the date of entry into force*].

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels,

*For the European Parliament*  
*The President*

*For the Council*  
*The President*

## **LEGISLATIVE FINANCIAL STATEMENT**

### **1. FRAMEWORK OF THE PROPOSAL/INITIATIVE**

- 1.1. Title of the proposal/initiative
- 1.2. Policy area(s) concerned in the ABM/ABB structure
- 1.3. Nature of the proposal/initiative
- 1.4. Objective(s)
- 1.5. Grounds for the proposal/initiative
- 1.6. Duration and financial impact
- 1.7. Management mode(s) planned

### **2. MANAGEMENT MEASURES**

- 2.1. Monitoring and reporting rules
- 2.2. Management and control system
- 2.3. Measures to prevent fraud and irregularities

### **3. ESTIMATED FINANCIAL IMPACT OF THE PROPOSAL/INITIATIVE**

- 3.1. Heading(s) of the multiannual financial framework and expenditure budget line(s) affected
- 3.2. Estimated impact on expenditure
  - 3.2.1. *Summary of estimated impact on expenditure*
  - 3.2.2. *Estimated impact on operational appropriations*
  - 3.2.3. *Estimated impact on appropriations of an administrative nature*
  - 3.2.4. *Compatibility with the current multiannual financial framework*
  - 3.2.5. *Third-party contributions*
- 3.3. Estimated impact on revenue

## LEGISLATIVE FINANCIAL STATEMENT

### 1. FRAMEWORK OF THE PROPOSAL/INITIATIVE

#### 1.1. Title of the proposal/initiative

Proposal for a Regulation of the European Parliament and of the Council on facilitating cross-border distribution of collective investment funds and amending Regulations 345/2013 and 346/2013

#### 1.2. Policy area(s) concerned

Financial stability, financial services and Capital Markets Union

#### 1.3. Nature of the proposal/initiative

- The proposal/initiative relates to a new action
- The proposal/initiative relates to a **new action following a pilot project/preparatory action**<sup>32</sup>
- The proposal/initiative relates to **the extension of an existing action**
- The proposal/initiative relates to **an action redirected towards a new action**

#### 1.4. Objective(s)

##### 1.4.1. *The Commission's multiannual strategic objective(s) targeted by the proposal/initiative*

General objective 1: A New Boost for Jobs, Growth and Investment  
General objective 2: A Deeper and Fairer Internal Market with a Strengthened Industrial Base

##### 1.4.2. *Specific objective(s)*

1.6 An increased cross-border investment flow.  
2.4 Consumers have access to safe and reliable insurance, pension and UCITS products and services, both nationally and across borders.  
ABM/ABB activity(ies) concerned  
12. Financial services and capital markets

<sup>32</sup> As referred to in Article 54(2)(a) or (b) of the Financial Regulation.

#### 1.4.3. *Expected result(s) and impact*

Specify the effects which the proposal/initiative *should have on the beneficiaries/groups targeted*.

Reducing the regulatory barriers to cross-border distribution of investment funds should reduce the costs for asset managers for going cross-border, thus accelerating the growth of cross-border distribution of investment funds and supporting deepening the single market for EU investment funds.

This, in turn, should reduce market fragmentation, increase competition, and ultimately help to deliver greater choice and better value for investors in the EU.

#### 1.4.4. *Indicators of results and impacts*

By end 2019, the Commission will establish a detailed programme for monitoring the outputs, results and impacts of this proposal. The monitoring programme will set out the means by which and the intervals at which the data and other necessary evidence will be collected. It will specify the action to be taken by the Commission, by the Member States and ESMA in collecting and analysing the data and other evidence.

For monitoring and preparing an evaluation of the impact of this proposal, the following non-exhaustive list of sources could provide for a basis for information gathering:

- (a) Websites of competent authorities regarding national marketing requirements and regulatory fees and charges,
- (b) ESMA database regarding national marketing requirements,
- (c) ESMA database regarding regulatory fees and charges,
- (d) ESMA interactive tool on regulatory fees and charges,
- (e) ESMA database for notifications.

Whereas source (e) would allow the Commission to verify whether the general policy objective has been met, sources (a) to (d) could serve to analyse in how far the specific policy objectives have been met.

The indicators for monitoring and evaluation linked to these sources would include the following output:

- creation/update of websites by competent authorities and ESMA (use of sources (a) to (c), checks whether information is available on these websites;
- creation of an interactive database on fees and charges by ESMA (use of source (d)), check whether the database is up and running.

As to the results and impacts, the analysis should be based on source (e). This source permits to identify the number of notifications in total and per Member States, as well as the growth rate in total and per Member State. The analysis should take into account the benchmark of the current increase of cross-border fund distribution: the average growth of the number of cross-border funds over the last five years was 6.8 % per year. All other things equal, growth should further accelerate thanks to this initiative. The evaluation based on source (e) could be done by ESMA once a year and should be submitted to the European Commission, for further use or analysis in the framework of its monitoring and evaluation exercise.



## **1.5. Grounds for the proposal/initiative**

### *1.5.1. Requirement(s) to be met in the short or long term*

On the short term, ESMA is tasked with developing and maintaining databases on national marketing requirements, regulatory fees and charges and notifications. Furthermore, as part of the database on regulatory fees and charges, ESMA is tasked with launching an interactive tool that would allow stakeholders to calculate the amount of regulatory fees for each Member State.

In addition, ESMA will need to develop regulatory and implementing technical standards within 18 months after the date of entry into force of this initiative.

### *1.5.2. Added value of EU involvement*

Action at EU level is necessary as the main problem this initiative aims to address is the functioning of the internal market for investment funds (more specifically the use of the EU marketing passport by investment funds), which is not limited to the territory of one Member State and cannot be achieved by Member States individually at national level. Furthermore, previous efforts to converge national (supervisory) practices in this area through ESMA have not succeeded to address the identified problem. This proposal therefore gives the above described tasks to the ESMA, which cannot be completed by Member States acting individually.

### *1.5.3. Lessons learned from similar experiences in the past*

ESMA has been charged with similar tasks already, such as keeping registers of authorised managers exist for UCITS, AIFs, EuVECA and EuSEF. The experience has been overall positive.

### *1.5.4. Compatibility and possible synergy with other appropriate instruments*

The initiative is in line with the enhanced role ESMA is given in the proposal concerning the ESA's review. It has, however, no direct impact on the Commission's proposal on the ESA's review since it concerns specific technical issue not addressed in the review.

**1.6. Duration and financial impact**

**Proposal/initiative of limited duration**

Proposal/initiative in effect from [DD/MM]YYYY to [DD/MM]YYYY

–  Financial impact from YYYY to YYYY

**Proposal/initiative of unlimited duration**

– Implementation with a start-up period from YYYY to YYYY,

– followed by full-scale operation.

**1.7. Management mode(s) planned<sup>33</sup>**

**Direct management** by the Commission through

–  executive agencies

**Shared management** with the Member States

**Indirect management** by entrusting budget implementation tasks to:

international organisations and their agencies (to be specified);

the EIB and the European Investment Fund;

bodies referred to in Articles 208 and 209;

public law bodies;

bodies governed by private law with a public service mission to the extent that they provide adequate financial guarantees;

bodies governed by the private law of a Member State that are entrusted with the implementation of a public-private partnership and that provide adequate financial guarantees;

persons entrusted with the implementation of specific actions in the CFSP pursuant to Title V of the TEU, and identified in the relevant basic act.

Comments

N/A

<sup>33</sup> Details of management modes and references to the Financial Regulation may be found on the BudgWeb site: <https://myintracomm.ec.europa.eu/budgweb/EN/man/budgmanag/Pages/budgmanag.aspx>.

## **2. MANAGEMENT MEASURES**

### **2.1. Monitoring and reporting rules**

*Specify frequency and conditions.*

In line with already existing arrangements, ESMA prepares regular reports on its activity (including internal reporting to Senior Management, reporting to Boards and the production of the annual report), and undergoes audits by the Court of Auditors and the Internal Audit Service on its use of resources. Monitoring and reporting of the present proposed actions will comply with already existing requirements.

### **2.2. Management and control system**

#### *2.2.1. Risk(s) identified*

In relation to the legal, economic, efficient use of appropriations resulting from the proposal, it is expected that the proposal would not bring about new risks that would not be currently covered by an ESMA existing internal control framework.

#### *2.2.2. Information concerning the internal control system set up*

Management and control systems as provided for in the ESMA Regulation are already implemented. ESMA works closely together with the Internal Audit Service of the Commission to ensure that the appropriate standards are met in all internal control areas. These arrangements will apply also with regard to the role of ESMA according to the present proposal. Annual internal audit reports are sent to the Commission, Parliament and Council.

### **2.3. Measures to prevent fraud and irregularities**

For the purposes of combating fraud, corruption and any other illegal activity, the provisions of Regulation (EC) No 883/2013 of the European Parliament and of the Council of 11 September 2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) applies to ESMA without any restriction.

ESMA currently has a dedicated anti-fraud strategy and resulting action plan. The strategy and action plan has been put in place in 2014. ESMA's strengthened actions in the area of anti-fraud will be compliant to the rules and guidance provided by the Financial Regulation (anti-fraud measures as part of sound financial management), OLAF's fraud prevention policies, the provisions provided by the Commission Anti-Fraud Strategy (COM(2011)376) as well as set out by the Common Approach on EU decentralised agencies (July 2012) and the related roadmap.

The Regulation establishing ESMA sets out the provisions on implementation and control of the ESMA budget and applicable financial rules.

### 3. ESTIMATED FINANCIAL IMPACT OF THE PROPOSAL/INITIATIVE

#### 3.1. Heading(s) of the multiannual financial framework and expenditure budget line(s) affected

- Existing budget lines

In order of multiannual financial framework headings and budget lines.

Heading of multiannual financial framework	Budget line	Type of expenditure	Contribution			
			from EFTA countries <sup>35</sup>	from candidate countries <sup>36</sup>	from third countries	within the meaning of Article 21(2)(b) of the Financial Regulation
1.a	12 02 06 ESMA	Diff..	NO	NO	NO	NO

- New budget lines requested

In order of multiannual financial framework headings and budget lines.

Heading of multiannual financial framework	Budget line	Type of expenditure	Contribution			
	Number [Heading..... ...]	Diff./non-diff.	from EFTA countries	from candidate countries	from third countries	within the meaning of Article 21(2)(b) of the Financial Regulation
[...]	[XX.YY.YY.YY] [...]	[...]	YES/N O	YES/N O	YES/N O	YES/NO

<sup>34</sup> Diff. = Differentiated appropriations / Non-diff. = Non-differentiated appropriations.

<sup>35</sup> EFTA: European Free Trade Association. .

<sup>36</sup> Candidate countries and, where applicable, potential candidates from the Western Balkans.

### 3.2. Estimated impact on expenditure<sup>37</sup>

#### 3.2.1. Summary of estimated impact on expenditure

EUR million (to three decimal places)

<b>Heading of multiannual financial framework</b>	1a	Competitiveness for growth and jobs
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ESMA			Year	Year	Year	Year	Enter as many years as necessary to show the duration of the impact (see point 1.6)			TOTAL
			N <sup>38</sup>	N+1 <sup>39</sup>	N+2	N+3				
Title 1:	Commitments	(1)	0 441	0 191						Due to ESAs co-financing arrangement 60/40, only 40 % of estimated costs are mentioned here.
	Payments	(2)	0 441	0 191						
Title 2:	Commitments	(1a)								
	Payments	(2a)								
Title 3:	Commitments	(3a)								
	Payments	(3b)								
<b>TOTAL appropriations for ESMA</b>	Commitments	=1+1a +3a	0 441	0 191						
	Payments	=2+2a +3b	0 441	0 191						

<sup>37</sup> See Annex for additional details.

<sup>38</sup> Year N is the year in which implementation of the proposal/initiative starts.

<sup>39</sup> The expenditure for the period of 2021-N is given only for illustrative purposes. The financial impact on the European Budget post 2020 will be part of the Commission proposals for the next Multiannual Financial Framework.

<b>Heading of multiannual financial framework</b>	<b>5</b>	‘Administrative expenditure’
---	----------	------------------------------

EUR million (to three decimal places)

		Year N	Year N+1	Year N+2	Year N+3	Enter as many years as necessary to show the duration of the impact (see point 1.6)			TOTAL
DG FISMA									
• Human resources									
• Other administrative expenditure									
<b>TOTAL DG FISMA</b>	Appropriations								

<b>TOTAL appropriations under HEADING 5 of the multiannual financial framework</b>	(Total commitments = Total payments)								
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EUR million (to three decimal places)

		Year N <sup>40</sup>	Year N+1 <sup>41</sup>	Year N+2	Year N+3	Enter as many years as necessary to show the duration of the impact (see point 1.6)			TOTAL
<b>TOTAL appropriations under HEADINGS 1 to 5</b>	Commitments	0 441	0 191						

<sup>40</sup> Year N is the year in which implementation of the proposal/initiative starts.

<sup>41</sup> The expenditure for the period of 2021-N is given only for illustrative purposes. The financial impact on the European Budget post 2020 will be part of the Commission proposals for the next Multiannual Financial Framework.

of the multiannual financial framework	Payments	0 441	0 191						
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### 3.2.2. Estimated impact on ESMA's appropriations

- The proposal/initiative does not require the use of operational appropriations
- The proposal/initiative requires the use of operational appropriations, as explained below:

Commitment appropriations in EUR million (to three decimal places)

Indicate objectives and outputs ↓			Year N	Year N+1 <sup>42</sup>	Year N+2	Year N+3	Enter as many years as necessary to show the duration of the impact (see point 1.6)										TOTAL			
			OUTPUTS																	
Type <sup>43</sup>	Average cost	No	Cost	No	Cost	No	Cost	No	Cost	No	Cost	No	Cost	No	Cost	No	Cost	Total No	Total cost	
SPECIFIC OBJECTIVE No 1.6 and 2.4 <sup>44</sup>																				
- Database on regulatory fees/charges			0 200	0 040																Due to ESAs co-financing arrangement 60/40, only 40 % of estimated costs are mentioned here.
- Database on notifications			0 100	0 020																
- Output																				
Subtotal for specific objective No 1																				

<sup>42</sup> The expenditure for the period of 2021-N is given only for illustrative purposes. The financial impact on the European Budget post 2020 will be part of the Commission proposals for the next Multiannual Financial Framework.

<sup>43</sup> Outputs are products and services to be supplied (e.g.: number of student exchanges financed, number of km of roads built, etc.).

<sup>44</sup> As described in point 1.4.2. 'Specific objective(s)...'.



SPECIFIC OBJECTIVE No 2 ...																		
- Output																		
Subtotal for specific objective No 2																		
<b>TOTAL COST</b>			<b>0 300</b>		<b>0 060</b>													

### 3.2.3. Estimated impact on ESMA's human resources

#### 3.2.3.1. Summary

- The proposal/initiative does not require the use of appropriations of an administrative nature
- The proposal/initiative requires the use of appropriations of an administrative nature, as explained below:

EUR million (to three decimal places)

	Year N <sup>45</sup>	Year N+1 <sup>46</sup>	Year N+2	Year N+3	Enter as many years as necessary to show the duration of the impact (see point 1.6)	TOTAL
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Officials (AD Grades)	0 141 (2 staff including recruitment costs)	0 131 (2 staff)						Due to ESAs co-financing arrangement 60/40, only 40 % of estimated costs are mentioned here.
Officials (AST grades)								
Contract staff								
Temporary staff								
Seconded National Experts								

<b>TOTAL</b>	0 141 (2 staff including recruitment costs)	0 131 (2 staff)						
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#### Estimated impact on the staff (additional FTE) — establishment plan

Function group and grade	Year N	Year N+1	Year N+2	Enter as many years as necessary to show the duration of the impact (see point 1.6)
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<sup>45</sup> Year N is the year in which implementation of the proposal/initiative starts.

<sup>46</sup> The expenditure for the period of 2021-N is given only for illustrative purposes. The financial impact on the European Budget post 2020 will be part of the Commission proposals for the next Multiannual Financial Framework.

AD16				
AD15				
AD14				
AD13				
AD12				
AD11				
AD10				
AD9				
AD8				
AD7				
AD6				
AD5				
AD Total	0 141 (2 staff including recruitment costs)	0 131 (2 staff)		
AST11				
AST10				
AST9				
AST8				
AST7				
AST6				
AST5				
AST4				
AST3				
AST2				
AST1				

AST Total				
AST/SC 6				
AST/SC 5				
AST/SC 4				
AST/SC 3				
AST/SC 2				
AST/SC 1				
AST/SC Total				
GRAND TOTAL	0 141 (2 staff including recruitment costs)	0 131 (2 staff)		

Estimated impact on the staff (additional) — external personnel

Contract agents	Year N	Year N+1	Year N+2	Enter as many years as necessary to show the duration of the impact (see point 1.6)
Function group IV				
Function group III				
Function group II				
Function group I				
Total				

Seconded National Experts	Year N	Year N+1	Year N+2	Enter as many years as necessary to show the duration of the impact (see point 1.6)
Total				

### 3.2.3.2. Estimated requirements of human resources for the parent DG

- The proposal/initiative does not require the use of human resources.
- The proposal/initiative requires the use of human resources, as explained below:

*Estimate to be expressed in full amounts (or at most to one decimal place)*

	Year N	Year N+1	Year N+2	Year N+3	Enter as many years as necessary to show the duration of the impact (see point 1.6)		
<b>• Establishment plan posts (officials and temporary staff)</b>							
XX 01 01 01 (Headquarters and Commission's Representation Offices)							
XX 01 01 02 (Delegations)							
XX 01 05 01 (Indirect research)							
10 01 05 01 (Direct research)							
<b>• External staff (in Full Time Equivalent unit: FTE)<sup>47</sup></b>							
XX 01 02 01 (AC, END, INT from the 'global envelope')							
XX 01 02 02 (AC, AL, END, INT and JED in the Delegations)							
<b>XX 01 04</b> <b>yy<sup>48</sup></b>	- at Headquarters <sup>49</sup>						
	- in Delegations						
<b>XX 01 05 02 (AC, END, INT — Indirect research)</b>							
10 01 05 02 (AC, END, INT — Direct research)							
Other budget lines (specify)							
<b>TOTAL</b>							

**XX** is the policy area or budget title concerned.

The human resources required will be met by staff from the DG who are already assigned to management of the action and/or have been redeployed within the DG, together if necessary

<sup>47</sup> AC = Contract Staff; AL = Local Staff; END = Seconded National Expert; INT = agency staff; JED = Junior Experts in Delegations. .

<sup>48</sup> Sub-ceiling for external staff covered by operational appropriations (former 'BA' lines).

<sup>49</sup> Mainly for the Structural Funds, the European Agricultural Fund for Rural Development (EAFRD) and the European Fisheries Fund (EFF).

with any additional allocation which may be granted to the managing DG under the annual allocation procedure and in the light of budgetary constraints.

Description of tasks to be carried out:

Officials and temporary staff	
External staff	

Description of the calculation of cost for FTE units should be included in the Annex V, section 3.

3.2.4. *Compatibility with the current multiannual financial framework*

- The proposal/initiative is compatible the current multiannual financial framework.
- The proposal/initiative will entail reprogramming of the relevant heading in the multiannual financial framework.

Explain what reprogramming is required, specifying the budget lines concerned and the corresponding amounts.  
[...]

- The proposal/initiative requires application of the flexibility instrument or revision of the multiannual financial framework.<sup>50</sup>

Explain what is required, specifying the headings and budget lines concerned and the corresponding amounts.  
[...]

3.2.5. *Third-party contributions*

- The proposal/initiative does not provide for co-financing by third parties.
- The proposal/initiative provides for the co-financing estimated below:

EUR million (to three decimal places)

	Year N	Year N+1 <sup>51</sup>	Year N+2	Year N+3	Enter as many years as necessary to show the duration of the impact (see point 1.6)			Total
Specify the co-financing body	0 662	0 287						60 % of estimated costs are mentioned here due to ESAs cofinancing arranegemetns
TOTAL appropriations co-financed	0 662	0 287						

<sup>50</sup> See Articles 11 and 17 of Council Regulation (EU, Euratom) No 1311/2013 laying down the multiannual financial framework for the years 2014-2020.

<sup>51</sup> The expenditure for the period of 2021-N is given only for illustrative purposes. The financial impact on the European Budget post 2020 will be part of the Commission proposals for the next Multiannual Financial Framework.

**3.3. Estimated impact on revenue**

- The proposal/initiative has no financial impact on revenue.
- The proposal/initiative has the following financial impact:
  - on own resources
  - on miscellaneous revenue

EUR million (to three decimal places)

Budget revenue line:	Appropriations available for the current financial year	Impact of the proposal/initiative <sup>52</sup>						
		Year N	Year N+1	Year N+2	Year N+3	Enter as many years as necessary to show the duration of the impact (see point 1.6)		
Article .....								

For miscellaneous 'assigned' revenue, specify the budget expenditure line(s) affected.

[...]

Specify the method for calculating the impact on revenue.

[...]

<sup>52</sup> As regards traditional own resources (customs duties, sugar levies), the amounts indicated must be net amounts, i.e. gross amounts after deduction of 25 % for collection costs.



## **ANNEX TO LEGISLATIVE FINANCIAL STATEMENT**

### **Applied methodology and main underlying assumptions**

The costs related to the new tasks attributed to ESMA have been estimated according to three cost categories: the staff costs, the infrastructure costs and the operations costs.

According to preliminary current estimations by the Commission, the new tasks for ESMA will require 2 new staff members. This would be in addition to the staff that is currently working for ESMA and that are covered under the current budget for ESMA. The costs are shared on a 60/40 basis with Member States.

The need for increased staff numbers reflects the additional tasks entrusted to ESMA and relates to the creation and maintenance of databases on national marketing requirements, regulatory fees and charges and notifications. These new tasks are set out in the proposed Regulation and further spelled out in the explanatory memorandum.

### **General assumptions made when calculating the additional resources**

When calculating the additional resources the following assumptions have been made.

Additional posts to be created are assumed to be either permanent staff or temporary agents with average annual salary costs of €143 000.

Due to the location of ESMA in Paris, a salary correction coefficient of 1.148 is taken into account due to the higher cost of living compared to Brussels.

Recruitment related costs (travel, hotel, medical examinations, installation and other allowances, removal costs, etc.) are estimated at €12 700 per staff member.

As a general remark, costs for ESMA are currently shared between Member States and the Commission on a 60/40 basis.

### **Calculation of additional headcount**

For the calculation of the additional headcount the new tasks are divided in two main areas of new work attributed to ESMA: database on regulatory fees and charges and database on notifications. For these areas, the following estimate of amount of work is taken into account. For the database on regulatory fees it is estimated that one project manager and one support staff are needed, whereas for the database on notifications one project manager and two IT support staffs are necessary.

Table 1 presents the total estimated additional headcount per area for ESMA:

**Table 1: Total FTE per annum per area**

Total FTE per area	
Database on regulatory fees/charges	1
Database on notifications	1
<b>Total</b>	<b>2</b>

### Calculation of the external infrastructure expenditure

For IT related expenditure it is assumed that in total € 750 000 are needed to set up the databases and €150 000 remain as ongoing costs.

**Table 2: Total external infrastructure expenditure per annum per area**

Total infrastructure expenditure per area	First Year (one-off costs)	Subsequent Years (ongoing costs)
Database on regulatory fees/charges	€ 500 000	€100 000
Database on notifications.	€250 000	€50 000
<b>Total</b>	€750 000	€150 000

### Total amount of expenditure

Taken into account the above assumptions the total amounts estimated for the new ESMA tasks are presented in Table 3.

**Table 3: Total related expenditures**

Cost type	Calculation	First Year	Subsequent Years
Staff expenditure	€143 000 x 1. 148 per staff/year	€328 328 (2 staff)	€328 328 (2 staff)
Expenditure related to recruitment	€12 700 fixed per new staff member	€25 400 (2 staff)	0
Infrastructure/IT	See table 2	€ 750 000	€150 000
<b>Total*</b>		€1 103 728	€ 478 328

**\*Total amounts: not taking into account the 60/40 allocation Member States/ Commission for ESMA budget.**

The expenditure for the period of 2021-N is given only for illustrative purposes. The financial impact on the European Budget post 2020 will be part of the Commission proposals for the next Multiannual Financial Framework.