

**IOSCO**  
**Public Comment on**  
**IOSCO**  
***Consultation Report on Retail Distribution and Digitalisation***  
**March 2022**

## About ALFI

The Association of the Luxembourg Fund Industry (ALFI) represents the face and voice of the Luxembourg asset management and investment fund community. The Association is committed to the development of the Luxembourg fund industry by striving to create new business opportunities, and through the exchange of information and knowledge.

Created in 1988, the Association today represents over 1,500 Luxembourg domiciled investment funds, asset management companies and a wide range of business that serve the sector. These include depositary banks, fund administrators, transfer agents, distributors, legal firms, consultants, tax advisory firms, auditors and accountants, specialised IT and communication companies. Luxembourg is the largest fund domicile in Europe and a worldwide leader in cross-border distribution of funds. Luxembourg domiciled investment funds are distributed in more than 70 countries around the world.

We thank the Board of the International Organization of Securities Commissions (IOSCO) for the opportunity to participate in this consultation on Retail Distribution and Digitalisation.

## Questions

*Do market participants agree that the proposed measures included in the policy and enforcement toolkits are appropriate for addressing the specific risks arising from 'retail distribution and digitalisation'?*

*Are there any areas that are missing and/or merit IOSCO consideration?*

In essence, initiatives supporting investor protection and the provision of fair and accurate information is strongly welcomed and supported. It is indeed believed that the investor protection framework and tools should acknowledge and address the technological and societal changes. During the review of the measures, proposed by IOSCO to achieve this objective, pragmatic implications and considerations have been raised. These items are identified and detailed below.

### I. General considerations

#### a) Taxonomy

The scope, nature and consequences of fraudulent activities and misconducts are diverse and heterogeneous. The effectiveness of a framework dedicated to prevent such activities depends on the framework capacity to address this heterogeneity. A taxonomy and definitions could help identifying and tailoring the adequate measures (such as for detection and power to take action) to the type of misconducts.

#### b) Existing framework

From a local perspective, the deployment of detection tools and regulatory frameworks, together with associated positive outcomes, have been observed. The European legal toolbox relative to

matters such as privacy, information sharing and resiliency has been and is being enriched. The overlap of the proposed measures with local developments and existing framework requires consideration for an effective implementation and calls for coordination.

Furthermore, online marketing gives access to a wide range of products to retail investors in several jurisdictions. Accordingly, harmonisation of the marketing and advertising frameworks (from a European perspective) is a pivotal requirement and objective. While internal rules, policies and tools are prerequisite for online marketing, considerations should be given to a regulatory framework for online marketing and associated risks consistent with the jurisdictions where the products are accessible. Firms in Europe are required to seek approval from regulators prior to marketing to retail investors. A comparable and harmonized framework and treatment could be sought for online marketing. Additionally, explicit consent from investors prior to monitoring their behaviour could be asked for. Based on the survey conducted by IOSCO, it seems that internal rules are developed without direct consideration for existing legal and regulatory framework. In this context a consistency check between the internal rules and existing regulatory framework is of relevance.

## II. Policy toolkit measures

### a) **Measure 1: Firm level rules for online marketing and distribution**

In line with proposed measure 1 of the policy toolkit, it is generally agreed that proper internal rules, policies, processes and tools for online marketing and distribution should be in place and regularly reviewed. This would ensure a common understanding and communication. However, in order to avoid mismatches, it would be necessary to have regulatory guidance on what is expected to be included in those policies and processes.

It may be relevant to highlight that trying to assemble technical items onto an extensive new 'digital' regulatory framework can be highly challenging for the regulator/auditor (in terms of control mechanisms), and/or several actors of the investment industry. This is even more relevant in the fast-changing digital world. It would translate into constant regulatory and internal rules' updates. Such a fast-changing environment would support the argument in favour of a principle-based framework.

Digital and traditional channels of marketing and distribution complement each other; they are neither mutually exclusive nor do they have a different effect on investors. Against this background, there should be uniform rules for all investment products. Such a uniform regulatory approach also prevents the requirements from being split up with parallel processes for the entity in scope of application (digital channels and traditional channels). Regardless of this, it may be necessary to adapt requirements to the specificity of the respective channel. Uniform rules for all market participants are also required to ensure transparency for retail clients and fair competition regardless of the used channel.

### b) **Measure 2: Firm level rules for online onboarding**

It is agreed that it is important to ensure compliance with the laws and regulations, and to provide clear, fair and non-misleading information to investors in line with the requirements established in the ESMA Guidelines (ESMA34-45-1272) on marketing communications. It may be noted that the technical capability to implement such filtering requirement could depend from the size of the firm in favour of larger players or external service providers. In the latter case, an adequate outsourcing framework (principles) could be needed.

### c) **Measure 3: Responsibility for online marketing**

In line with proposed measure 3 of the policy toolkit, it is agreed that management should assume responsibility for the accuracy of the information provided to potential investors on behalf of the firm.

Beyond accuracy, clarity (simple language) of information (and disclaimer) is a relevant criterion to consider for investor protection. In the context of social media marketing campaign, the presence of disclaimer highlighting that the number or eminence of likes/shares/endorsements/etc. is not a sign of quality/appropriateness of any financial product could be further considered.

The last term (“on behalf of the firm”) makes it clear that management would only be obliged to assume responsibility where there is a contractual relationship (delegation/mandate) with influencers etc. If the latter acted independently, the management should not be responsible for what and how they communicate. Distributors are indeed subject to marketing and distribution requirements stemming out from the legal and regulatory frameworks applicable to them by virtue of their own licences and authorisations and should remain responsible for identifying and complying with the relevant requirements applicable to their distribution activities: fund managers cannot assume responsibility for the distributor's marketing documents.

It must also be noted that there are internet fora that aim at providing information as to good investments or rankings. ALFI is of the view that the fund promoter/manager should not be held accountable for any information issued on websites which are not under their control.

Naturally, compliance and consistency of the online marketing with the profile of investors (eligible counterparties, professionals and retail investors) and existing regulatory framework (MiFID, marketing rules, etc.) is assumed and support the argument in favour of a harmonized framework from a European perspective. However, ALFI would also recommend to avoid any redundancy with already existing EU regulations which aim at regulating online services like distance marketing and to protect consumers.

**d) Measure 4: Capacity for surveillance and supervision of online marketing and distribution**

It is agreed with the fact that the checks by the management company/AIFM as described in measure 4 should take place. As regards monitoring, obligations should be limited to what is under the control of the firm, in other words, only the activity of authorised delegates should be requested to be monitored. This latter limitation is pivotal in the investment fund management landscape. While involving management companies/AIFM in the monitoring of “*controlled*” information is reasonable, management companies/AIFM cannot be held accountable for the monitoring of “*non-controllable*” marketing (such as unsolicited publications on the Internet).

**e) Measure 5: Staff qualification and/or licensing requirements for online marketing**

It is agreed, as proposed in measure 5 of the policy toolkit, to consider the necessary qualifications for digital marketing staff provided it is clear what is meant by qualification (e.g. self-certification or annual training etc.). This should be clarified by the supervisory authorities. It is thought that the term ‘licencing’ may go too far. The requirements for online activities should be comparable to other marketing activities, but staff should be made aware of any specificities linked to online marketing.

**f) Measure 6: Ensuring compliance with third country regulations**

The proposed measure 6 of the policy toolkit is agreed with. Within the European Union, due diligence rules concerning onboarding of clients already exist and distributors must adhere to local marketing rules for which application is specified within the ESMA Guidelines (ESMA34-45-1272) on marketing communications. In the specific case of reverse solicitation, where the client approaches the firm regarding a product, it is important to carry out due diligence before accepting any subscription by the client. Hence the frameworks already exist and online marketing specificities could be embedded (adjustments). Due to the increasing use of digital media, it is important to promote convergence of the marketing and advertising rules of investment products from our European perspective.

**g) Measure 7: Clarity about legal entities using internet domains**

The proposed measure 7 of the policy toolkit is agreed with. For investment funds, in the European Union, Article 4 of the CBD Regulation (2019/1156) establishes detailed rules concerning marketing communications for which application is specified within the ESMA Guidelines (ESMA34-45-1272) on marketing communications. For the smaller firms, it may sometimes be difficult to draft and implement detailed policies and procedures. A prohibition for firms from redirecting clients to a third country website to avoid the regulatory requirements in a jurisdiction sounds unnecessary from a European perspective, but the situation might be different in other countries. Instead of prohibiting, alternatively, consent could be sought and the risks linked to those third country websites should be provided in simple terms.

It is considered that it would be operationally difficult for supervisory authorities to implement and administer an open register as described in measure 7.

**III. Enforcement toolkit measures**

**a) Measure 1 - Proactive technology-based detection and investigatory techniques**

*Detection and investigation program*

Measure 1 of the enforcement toolkit proposes a technology driven solution to the detection challenge posed by the plethoric information load. While new technologies may offer valuable capabilities in the treatment and screening of large amount of data/information, it does not appear as a stand-alone solution and may be complemented with additional organisational and human arrangements.

Firstly, technology-based detection responds to algorithmic logics allowing to set warnings and reduces the set of cases to consider. However, this logic will no substitute for (expert) judgements in qualifying the observations made. Accordingly, an effective and efficient detection program would rely on an established framework governing both technology and human processes as well as would not underestimate the human resources associated with the use of technology.

Secondly, both the threats (fraudulent technics) and opportunities (detection technics) are fast evolving. This dynamic calls for an ongoing and incremental improvement of the technological toolkit. Similarly to the point made in the previous paragraph, an effective and efficient detection program around the technical means should be established and include periodic review of the effectiveness and adequacy of the tools.

In order to address these considerations, the measure may also consider the program beyond the technology.

*Cooperation and coordination*

While the threats associated with online technologies are becoming a pressing priority in the field marketing and distribution of financial services and products to retail investors, those have been long term considerations in other fields (e.g. terrorist activities surveillance). Hence, digital surveillance is not confined to security regulators and other governmental agencies have already gained significant experience in the development and use of technologies.

It is believed that a holistic digital threats detection and investigation program across different agencies (beyond securities regulators) would allow for important experience sharing, economies of scale and would shorten the time to implementation/update of the tools. It is further believed that IOSCO members could strongly benefit from (and contribute to) the experience acquired by other regulators in digital surveillance and cybersecurity.

*Regulatory consistencies*

Furthermore, in light of the regulatory consistency argument made in section “General considerations”, some countries might not allow the monitoring of tool and approaches and explicit consent may be required. Consistent approaches should be developed taking into consideration the existing regulatory framework.

**b) Measure 2 – Power to promptly take action where websites are used to conduct illegal securities and derivatives activity, and other powers effective in curbing online misconduct**

While the power to take action, as proposed in measure 2 of the enforcement toolkit, may support the mitigation of the risk associated with fraudulent activities, important practical aspects could be addressed in light of an implementation.

- Although the recourse to effective action power seems to be achievable in domestic countries, the challenge would lie in a cross-boarder context with jurisdiction (potentially even not represented by IOSCO members) with significantly diverging framework and granted power. Although local actions are possible to block access to a foreign website, it may be relevant to consider that the remapping across jurisdictions represents a challenge for a long-term solution.
- Additionally, Internet Service Provide (ISP), playing a role in the “blocking” of a website, are also subject to existing frameworks and obligations pertaining to their activities and respective competent authorities. Any intervention, purposing to protect investors in the context of the digitalisation of marketing and distribution of financial services, would also require consideration to the other existing frameworks and supervision responsibilities to be effectively applicable and avoid overstepping and non-applicable recourses. In this context, coordination would be necessary in order to avoid redundancy or contradiction with existing frameworks that are and have been deployed.
- Finally, experience in blocking access (at the domain name or routine level) has shown that the process may take significant time. In a democratic context, the process to balance freedom of speech and investor protection would require an adequate governance process impacting the timeliness (and potentially effectiveness) of the action.

**IV. Other considerations**

- The current consultation encompasses the protection of investors from a marketing and distribution perspective. It is worth mentioning that, along with the opportunities and benefits created, the risk associated with digitalisation may impact investor protection through other channels. For example, potential disruptive effects on markets and fair pricing could result from social trending bubbles facilitated by digital platforms.
- Similarly, in case of recourse to an external platform for marketing and distribution purposes, considerations for potential investor data being used and stored externally could be made (in contrast with marketing and distribution executed through their ‘own’ platforms).

In the context of onboarding (measure 2 of the policy), investor data protection is a relevant matter. The risks linked to the collect of personal information could be clearly stipulated. Investors could be able to access its data on the online tool (all time and update and/or change).

- The consultation regards the risks associated with digitalisation. With respect to the onboarding topic, the opportunity of mutualisation allowed by digitalisation could be brought forward as a source of efficiency for processes such as AML and KYC and in general as a driver for a capital market union in the context of EU.