European Commission report to the European Council and Parliament on national barriers to capital flows. Junio 2017.

In March the European Commission published its report “Accelerating the capital markets union: addressing national barriers to capital flows” on existing national barriers to capital flows within the capital markets union (CMU).

Building integrated financial markets as part of the EU requires not only important decisions at EU level but also commitments by each Member State to tackle national barriers.

To this end, since June 2015 the Economic and Financial Affairs Council (ECOFIN), the Commission, an group of experts from Member States and the European Parliament as an observer have been working together to map national barriers to cross-border capital flows and find the best ways of tackling those that are either not justified by public interest considerations or disproportionate.
The report identifies an initial set of barriers, focusing on those which obstruct cross-border operations by investors throughout of the investment cycle.

A distinction is made between “ex-ante” barriers, encountered when the investor seeks to make a cross-border investment, “in itinere" barriers, encountered during the investment process and which may deter investors from maintaining or increasing their cross-border exposure, and "ex-post" barriers, which create difficulties at the end of the investment process.

For each of these, the report sets out the results of the discussions in the expert group and proposes next steps. The Commission expects Member States to agree on the proposed roadmap and take action accordingly. It intends to monitor the implementation of the proposed actions and, while continuing to work with Member States to gather exhaustive and updated information, it invites the expert group to identify other barriers in other areas affecting the CMU.

The roadmap will continue to evolve to incorporate additional actions as from 2019 on barriers that may be identified in a second stage.

1. Barriers before investing (“ex-ante”):

The first stage identified barriers in the following areas:

1.1 Barriers to the cross-border distribution of investment funds

The European passporting system has allowed the development of cross-border marketing of funds in the EU. Currently, 80% of UCITS and 40% of AIFs are marketed cross-border. However, the distribution of funds is very geographically limitedacross the EU. A third of these funds are only sold in one EU member state and another third in no more than four additional countries. There are various reasons for this, including concentrated fund distribution channels in individual Member States, cultural preferences and a lack of incentives to compete across-borders.

There is also a need for coordinated action on barriers at EU level and in 2016 the Commission therefore launched a consultation on barriers to the cross-border distribution of investments funds. The expert group, in the first stage of its work, identified three areas where national regulations and practices obstruct cross-border investment:

Marketing requirements:

Wide disparities in national rules and divergent supervisory approaches are an impediment to fully effective use of the EU passport. These may have an impact either in the very early stages of a fund's life cycle, when asset managers may need to test the appetite of potential investors, or once the fund has been launched, when fund managers may be approached by potential clients.

The effect is to impose costs on management companies, who need to research and comply with different national regimes for marketing, financial promotion and consumer protection. To ease this burden, the expert group has proposed clarifying the concepts of pre-marketing and reverse solicitation (where potential clients contact directly the fund manager) to seek greater convergence in these areas.

Administrative arrangements:

Diverging administrative arrangements in host Member States could also represent a barrier to cross-border marketing of funds and do not always add value for domestic investors. For instance, most Member States require that there should be redemption, subscription and payment facilities based on their territory.

On this point, the Commission has invited Member States to further map the administrative arrangements in place at national level with a view to eliminating unnecessary administrative burdens by 2019.

Regulatory fees for marketing cross-border:

Passporting of all EU investment funds requires a formal notification process and in many cases a fee is applied by national competent authorities (NCAs).

The range of legal fees applied a lack of transparency on how these are calculated and the regulatory frameworks in force discourage the expansion of cross-border fund marketing in the EU. Besides administrative fees, the legal and advisory costs of operating in multiple markets impose a serious burden on managers, especially smaller managers.

To address this, the expert group agreed measures to ensure greater clarity, transparency and predictability of national fees. The Commission invites Member States to publish information on all fund notification-related fees in a comprehensive and user-friendly manner on a single national public website. Meanwhile, the Commission, as part of the consultation on cross-border fund distribution, is assessing whether such fees are compatible with an efficient notification procedure and how to ensure they are not excessive. In its proposal to revise the EuVECA and EuSEF regulations, the Commission has esplicitly prohibited host NCAs from charging fees.

1.2 Barriers from requirements on investment by pension funds

In this area, the expert group identified a possible bias in the choice of investments due to national restrictions on pension fund investments. Many Member States apply limits on investments in various asset classes, such as shares traded on non-regulated markets, unlisted shares and shares traded outside EU, EEA or OECD countries.

The Commission invites Member States, among other initiatives, to create a sub-group with the industry to look at successful examples of cross-border investment in the EU in order to identify the main drivers in pension funds' investment decisions and promote best practice, and raise awareness about new opportunities under the Investment Plan to make infrastructure investment more attractive and accessible to institutional investors.

1.3 Barriers through different national approaches to crowdfunding

Different standards currently apply in different countries. These include: a) different definitions of crowdfunding and the scope of activities for investment-based models; b) conditions for authorisation; c) business requirements such as professional qualifications, investment limits, conflicts of interest, etc., and d) investor and consumer protection rules.

The Commission proposes a debate on these issues bringing together the industry, European Supervisory Authorities and Member States. It also invites Member States to consider whether current national crowdfunding legislation provides an effective level of investor and consumer protection while permitting cross-border activity.

2. Barriers during the investment process ("In itinere"):

The expert group and the Commission identified the following barriers during the investment process:

2.1 Residence and location requirements imposed on the managers of financial market players

Some Member States require that managers are locally resident as a condition for appointment to certain positions, such as directors or senior executives, which could pose a major obstacle to smaller asset managers or investment services firms.

NCAs have argued that such requirements make supervision easier, ensure effective management and prevent fraud. However, the restrictions do not always seem to be justified or proportionate to achieving these aims. That said, NCAs must always be able to require that managers dedicate sufficient time to their responsibilities, have adequate experience or expertise and are present when required.

The Commission invites Member States to remove residence requirements on managers of financial firms residing in the EU where these are not justified or proportionate.

2.2 Insufficient financial literacy

Consumers and SMEs are being offered increasingly complex financial products and do not always have the financial literacy to understand the risks involved or take advantage of the financing opportunities available.

In recent years, Member States have launched a host of initiatives to promote financial literacy. Most of these are aimed at particular types of consumers, such as young adults or pensioners, or vulnerable groups, without specifically mentioning the options available abroad in other EU states.

In this area, the Commission invites Member States to continue the work on financial literacy through exchange of best practices in the design, implementation and evaluation of their programmes. It also invites the expert group to contribute to possible CMU-related initiatives for the development of innovative solutions to improve financial literacy among SMEs and support them in accessing other sources of finance.

3. Barriers after investment (“Ex-post”):

3.1 Differences in national insolvency regimes

Differences in this area generate legal uncertainty, extra costs and create barriers to an efficient restructuring of viable companies, including cross-border groups in the EU.

The Commission invites Member States and the European Parliament to support its recent Draft directive on preventative restructuring frameworks and second chance and consider its provisions for the deepening of the internal market.

The Commission also recently launched an initiative to benchmark national loan enforcement regimes, including insolvency arrangements.

3.2 Discriminatory and burdensome procedures for withholding tax relief

Capital market investors and Member States have repeatedly highlighted withholding tax procedures as a major deterrent to cross-border investment. The ECOFIN Council pointed out in November 2015, as a way to support CMU initiatives, that pragmatic solutions needed to be found to tax obstacles such as double taxation linked to withholding tax arrangements.

On this point, in addition to having to prove their place of residence, investors active in the EU have to complete up to 56 different forms which in many Member States cannot be done online. This makes reclaiming tax withholdings a lengthy and costly business. While progress has been made on this front, the general status quo remains unsatisfactory and requires urgent action as it affects all types of financial instruments and market participants.

The expert group has mapped the current situation in the EU, identifying nine areas of good practice in reducing withholding burdens. The Commission invites Member States to assess and confirm where appropriate the relevance of the best practices identified and make commitments as to which they want to implement by 2019. The Commission will also work with national tax experts on a code of conduct setting out principles for reducing withholdings, taking these best practices as a starting point.

4 Conclusion:

The final results of the working group should be to propose a joint roadmap for the elimination of these barriers which will complement parallel initiatives to address other obstacles to investment identified by the Commission in the context of the European Semester [(1)] and CMU.

In view of its commitment to accelerate reforms to create CMU, the Commission invites Member States to discuss and agree actions that will form an agreed joint roadmap for eliminating national barriers to capital flows.

This process does not prevent the Commission from considering other legislative proposals or tools for addressing the barriers identified.

[1] *The European Semester sets a framework for coordination of economic policies across the EU. It allows EU Member States to debate their fiscal and economic plans and monitor their progress at specific points during the year.*

Links:

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