

New cross-border distribution regime: 2 months to go. Are you ready?

Webinar

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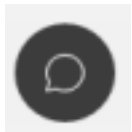
Hello and welcome!

Let's enjoy an interactive session



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Introduction

Objectives

As of today, still different regulatory and supervisory approaches re. cross-border distribution of collective investment funds which result in barriers to cross-border marketing access of Alternative Investment Funds and UCITS.

CBDF Regulations objectives:

- Enhance the regulatory framework applicable to the distribution of AIFs and UCITS
- Further coordinate the conditions for fund managers operating in the countries of the European Economic Area
- Facilitate cross-border distribution of investment funds

Scope

CBDF Directive

Directive (EU) 2019/1160 of 20 June 2019 with regard to cross-border distribution of collective investment undertakings amending:

- ✓ UCITS Directive (2009/65/EC)
- ✓ AIFM Directive (2011/61/EU)

CBDF Regulation

Regulation (EU) 2019/1156 of 20 June 2019 on facilitating cross-border distribution of collective investment undertakings and amending:

- ✓ EuVECA Regulation (EU 345/2013)
- ✓ EuSEF Regulation (EU 346/2013)
- ✓ PRIIPs KIDs Regulation (EU 1286/2014)

CBDF Regulations - Timeline

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Topics addressed in the CBDF Regulations

CBDF Directive

- Harmonised definition of the pre-marketing concept (so far not applicable to UCITS)
- Notification procedure (maintenance) => AIFM / UCITS marketing passport
- De-notification
- Facilities available to retail investors

CBDF Regulation

- Marketing requirements
 - ✓ Requirements on marketing communications,
 - ✓ Publication of national provisions, ESMA central database on national provisions
 - ✓ Ex-ante verification of marketing communications (UCITS, AIFM, EuVECA and EuSEF Managers selling funds to retail investors)
- Standardisation of notifications to ESMA (central database)
- Fees and charges
 - ✓ Fees in line with actual costs incurred for carrying out the duties
 - ✓ Regulator invoice to be provided
 - ✓ Publication of the fees on the EEA Member States regulator's / ESMA website

1. Pre-marketing concept

Pre-marketing – Differs in each Member State

Usually considered as activities undertaken as long as investors cannot formally subscribe (Luxembourg interpretation in CSSF FAQ dated January 2021)

Conditions of pre-marketing	PRIOR TO CBDF					POST CBDF
	BE	FR	DE	IT	LU	All EU countries
Provision of draft AIF documentation	😊	😬 ¹	😊	😞	😊	😊
Establishment of the AIF possible	😞	😊	😞 ²	😞	😊	😊
No disclosure on AIF documents required	😞	😊	😞	-	😊	😞
Subscription possible			😞			😞
No requirement for a notification of the pre-marketing activities	😊	😊	😊	-	😊	😞

¹ Maximum of 50 investors: professional and non-professional investors allowed with a minimum of subscription of 100.000 euros

² i.e. the AIF should not have a closing yet

Pre-marketing CBDF Directive

- A definition (sometimes more restrictive than the one currently available in some EEA Member States) has been voted on 20 June 2019:

“Pre-marketing means provision of information or communication, direct or indirect, on investment strategies or ideas by an EU AIFM or on its behalf, to potential professional investors domiciled or with a registered office in the Union in order to test the interest in an AIF which is not yet established or established but not yet notified for marketing in that Member State where the potential investors are domiciled or have their registered office.”

- Conditions:
 - Not yet established AIF or established but not yet notified for marketing
 - Applicable to EU AIFM/AIF only
 - Information not sufficient to allow investors to commit to acquiring shares/units
 - No possibility for investors to subscribe
 - No subscription documents (or equivalent) in a draft of a final form to be provided
 - Final form of constitutional / offering documents (of an AIF not yet established)
 - Disclosure on offering documents (no possibility to subscribe / incomplete subject to change)
 - Information related to pre-marketing activities shall be available to local Member States regulators

Pre-marketing

CBDF Directive

- Subscriptions by professional investors after such pre-marketing activities are considered as being the result of marketing, and hence necessary prior notifications must have been done (no possibility to rely on reverse solicitation during 18 months from the beginning of the premarketing activity).
- Information about pre-marketing shall be sent to the home country regulator of the AIFM within 2 weeks after pre-marketing activities have started:
 - When and where the pre-marketing is taking place
 - In respect of which AIFs, stating their investment strategies
 - With a brief description of the pre-marketing
- Third party in charge of pre-marketing shall be:
 - Investment firm / tied agent in accordance to MiFI Directive
 - Credit institution
 - UCITS management company
 - Authorised EU AIFM
- Not applicable to UCITS until assessment is made by the Commission (2 August 2023)

2. EU Marketing Passport - maintenance

Current European Marketing Passports

UCITS (Art. 93 UCITSD)	AIFs (Art. 31, 32 AIFMD)*
No pre-marketing harmonised	No pre-marketing harmonised
UCITS Regulator to Regulator process (except maintenance)	AIFM Regulator to Regulator process
10 Working Days	20 Working Days
Information / Paying Agent	Not needed in notification file
For public distribution	For marketing to professional investors only (& locally semi-pro.)
Highly standard	Quite standard
Maintenance = changes made to initial notification file and fund documents	Maintenance = “Material changes” only (according to the law... CSSF practice differs)

**Cf. Art. 36 AIFMD for EU AIFM with either non-EU AIF(s) or EU AIF(s) being feeder of non-EU AIF(s)*

Cf. Art. 42 AIFMD for non-EU AIFM

Cf. Art. 43 AIFMD re. marketing to retail investors

1) Changes to notification letter(s)

- Notification letter to include details for invoicing corresponding regulators' fees
- Details of entity in charge of providing facilities to retail investors (in case of AIF)

2) Changes to notification processes

- No change to the current UCITS and AIFM initial passporting processes
- X-border registration maintenance processes impacted:
 - 1 month deadline now applicable to the AIFM home Member State regulator to transmit a revised file
 - from single to dual procedures applicable to UCITS: 1 month prior notice in certain cases
 - new timelines & procedures applicable to the home Member State regulator in case of non-compliance of the AIFM/AIF/UCITS with their respective Directives

3. De-notification process

De-notification

Key elements foreseen by the CBDF Directive:

- Harmonised process
- Possibility to de-register even when investors remain in the UCITS/AIF
- Blanket offer for at least 30 days, to repurchase free of any charges or deductions (except for closed-ended funds) all shares or units, notice shall be sent 30 days before the de-registration takes place (individually or through intermediaries) explaining the consequences of not accepting the offer
- De-registration shall be made public by means of a publicly available medium (including consequences of not accepting the offer to redeem or repurchase)
- AIFM/UCITS still subject to transparency requirements towards investors and Home Member State regulator (as long as investors remain in the fund)
 - Fund documents such as prospectus, financial reports, constitutive documents, KIIDs, NAV etc.
 - Annual report, article 23 disclosure
- For AIF, no possibility to do pre-marketing during a period of 36 months after de-registration (of same AIF, investment strategy, idea) in the relevant country of de-notification

4. Facilities available to retail investors

Facilities available to retail investors

New criteria foreseen by the CBDF Directive for marketing in the European Union to retail investors:

- Clear information on facilities to be made available to retail investors (subscription, repurchase, redemption and other payments, information/documents available, access to procedures and arrangements put in place with respect to investor's exercise of their rights arising from their investment etc., act as the point of contact with competent authorities)
- Information to be provided on how the facilities are rendered (in a durable medium)
- Facilities to be provided in one of the official languages of the Member States where the fund is marketed to retail investors (or approved by the competent authorities)
- No local physical presence required (facilities can be made available by the UCITS / AIFM / third party duly appointed)
- Facilities to be provided by the UCITS/AIFM itself or by a third party (written contract) subject to regulation and supervision governing the tasks to be performed (or both)

5. Marketing communications

Marketing communications

Requirements related to the content of the marketing communications:

- Identifiable as such, provide risk and rewards of purchase, fair, clear and not misleading
- Information not in contradiction with:
 - prospectus / KIID -> UCITS
 - Article 23 AIFMD (and offering document/KID for AIF the case may be)
- Information on how, where and in which language investors can obtain the prospectus/KIID + hyperlink to or website address for those documents
- Information on how, where and in which language investors can obtain the UCITS summary of investor rights + hyperlink to or website address for such a summary
- Information that cease of marketing is possible

Marketing communications

Ex-ante verification of marketing communications:

- Applicable to UCITS and AIFs sold to retail investors (including EuVECA and EuSEF managers)
- Member States regulator may require prior notification of documents used for investors
- Shall not constitute a prior condition for the marketing
- Corresponding MS regulators shall inform within 10 working days of receipt when amendments have to be made
- Rules and procedures shall be published on regulator's website

6. Transparency requirements

Transparency of marketing requirements and regulator fees

National regulators (will) have:

- **to send to the address referred to in AIFM/UCITS notification file:**
 - Invoice, payment instruction (including due date and means of payment) of the fees levied by the national regulator
- **to publish online (maintain up-to-date), and notify to ESMA:**
 - all applicable provisions governing marketing requirements for UCITS and AIFs and related hyperlinks to website
 - information on their fees relating to marketing requirements, which have to be “consistent with the overall cost relating to the performance of the functions of the competent authority.” and related hyperlinks
- **to report to ESMA**
 - de-notification of UCITS/AIFs
 - information related to ex-ante/post verifications of marketing communications (amendments requested, identification of breaches highlighting the most frequent ones, sanctions etc.)

ESMA

At the level of ESMA:

- **31 March 2021**, information related to ex-ante/post verifications of marketing communications provided by MS regulators to ESMA
- ESMA Technical standards to be approved or commented by the EU Commission **by 31 May 2021** (standard forms, templates and procedures)
- **By 2 August 2021** Communication of link to Member States regulators' website related to:
 - applicable national laws, regulations and administrative provisions governing marketing requirements
 - fees / charges and development of a publically available interactive tool by **2 February 2022** to provide an indicative calculation of the fees or charges
- **As from 2 August 2021** Communication from MS regulators to ESMA re. de-notification (UCITS/AIF)
- **December 2021 (tbc)**, ESMA guidelines on marketing requirements will enter into force
- **By 2 February 2022**, list of AIFs/UCITS marketed to be published on ESMA Central Database

=> ESMA Central Database: by 2 February 2022

7. Q&A

Contact Us

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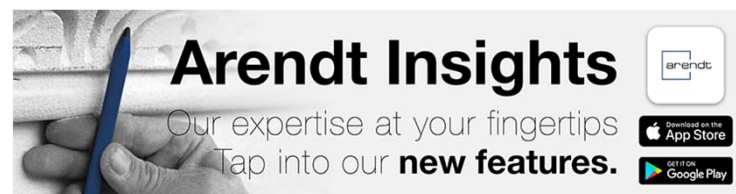
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