

# A new paradigm for the distribution of EU products

London – 11 February 2020

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# Agenda

- Fund distribution: a few numbers
- Pre-marketing
- Need for local facilities?
- De-notification
- UCITS marketing passport: maintenance
- Marketing communications
- Brexit impact on distribution into the EU / UK
- Swiss distribution rules: practical impact of the significant changes

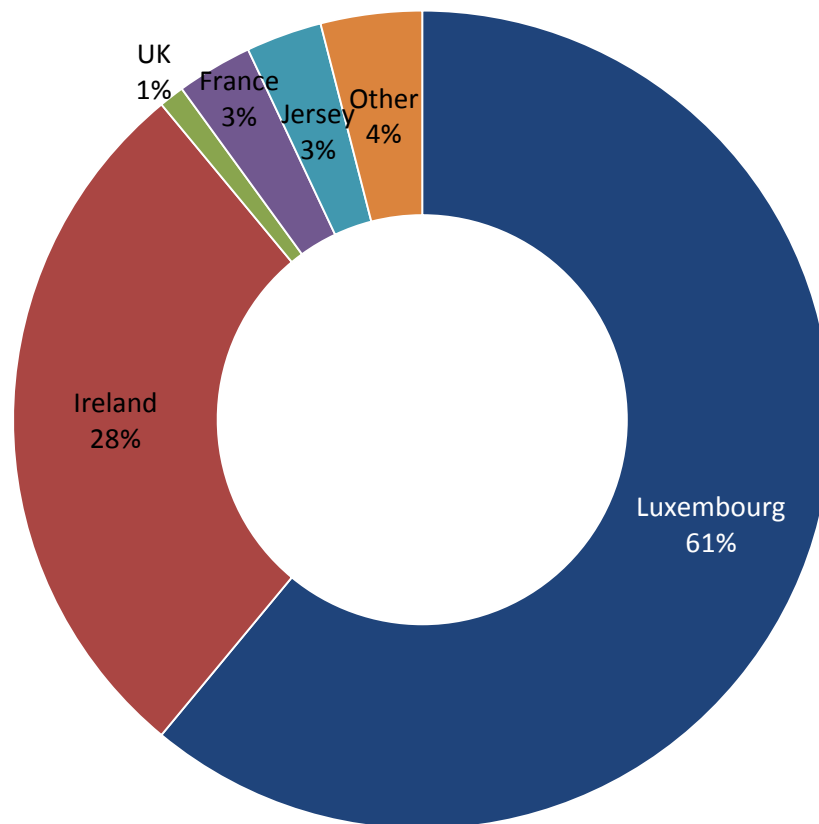
# LUXEMBOURG FUND DISTRIBUTION: A FEW NUMBERS

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# Luxembourg: a centre of excellence for fund distribution

61% of authorisation for cross-border distribution comes from funds domiciled in Luxembourg

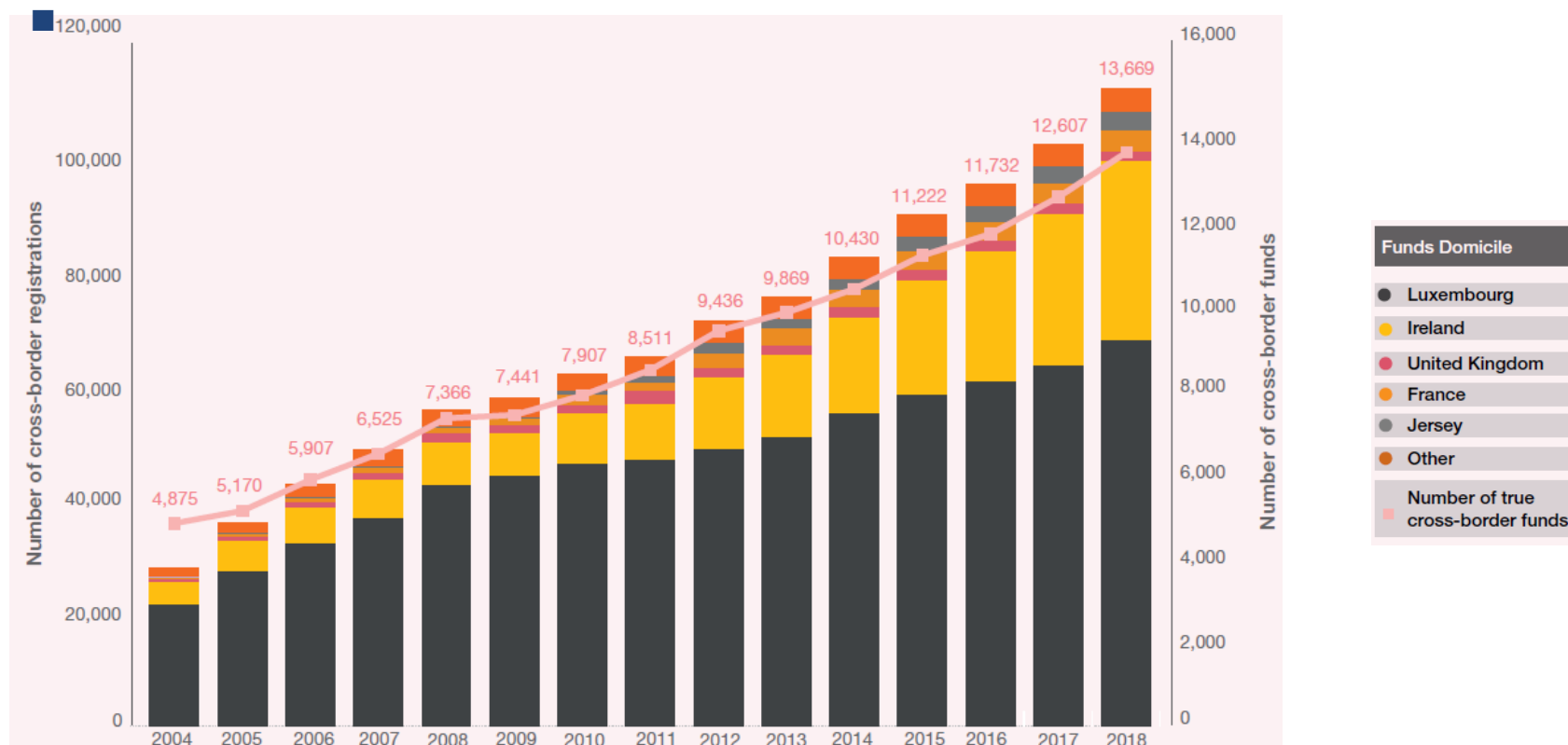
Domicile share of authorisations for cross-border distribution



Top 5 destinations of leading fund domiciles

Germany	5,894
Switzerland	5,222
France	5,076
Austria	4,886
United Kingdom	4,259

# Cross-border distribution of funds - A successful UCITS passport mechanism



Data as of March 2019  
Source: PWC
































# PRE-MARKETING

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# Pre-marketing by EU AIFMs

- Current position:

- No harmonisation (table below for illustration purposes only):

	BE	FR	DE	IT	LU	UK
Provision of draft AIF documentation						
Establishment of the AIF						
No disclosure on AIF documents				-		
Subscription possible						
Attendance to conference						

<sup>1</sup> Maximum of 50 investors: professional and non-professional investors allowed with a minimum subscription of €100,000

<sup>2</sup> No reference can be made to the relevant AIF, for professional investors only

<sup>3</sup> i.e. the AIF should not have had a closing yet

<sup>4</sup> To institutional and professional investors only

# Pre-marketing by EU AIFMs

- New rules under the CBDF: **definition**

- Provision of information or communication, direct or indirect, on investment strategies or investment ideas by an EU AIFM or on its behalf...
- ...to potential professional investors domiciled or with a registered office in the EU...
- ... in order to test the investors' interest in an AIF or a compartment which is not yet established...
- ... or in order to test their interest in an AIF or a compartment which is established, but not yet notified for marketing in that Member State where the potential investors are domiciled or have their registered office...
- ... and which does not amount to an offer or placement to the potential investor to invest in the units or shares of that AIF or compartment



# Pre-marketing by EU AIFMs

- New rules under the CBDF: **conditions**
  - Draft prospectus or offering documents shall not contain information sufficient to allow investors to take an investment decision
  - Documents shall clearly state that (i) they do not constitute an offer or invitation to subscribe to shares of an AIF and (ii) information presented therein should not be relied upon because it is incomplete and may be subject to change

# Pre-marketing by EU AIFMs

- New rules under the CBDF: **impact**
  - EU AIFMs engaging in pre-marketing activities must:
    - ✓ notify the home MS regulator by “informal letter” within 2 weeks of commencing pre-marketing
  - Prompt information by the home MS regulator of the competent authorities of the MS in which the EU AIFM is engaged in pre-marketing
  - If pre-marketing, no reverse solicitation within the subsequent 18 months
- Currently not applicable to UCITS
- What about non-EU AIFMs?
- Which (regulated) entities can conduct pre-marketing?



# NEED FOR LOCAL FACILITIES?

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## Local facilities

- Current situation
- Changes made by the CBDF:
  - Provisions of facilities in each MS of marketing **BUT** no requirement for a physical presence in the MS nor to appoint a third party
  - Applies to UCITs and AIFs sold to retail investors
  - Both UCITS mancos and AIFMs will need to provide the relevant facilities in each relevant MS in the official language of that country or in a language approved by the local regulator
  - In case a third party provides any of the facilities, the third party must be subject to regulation and supervision in relation to the tasks to be performed



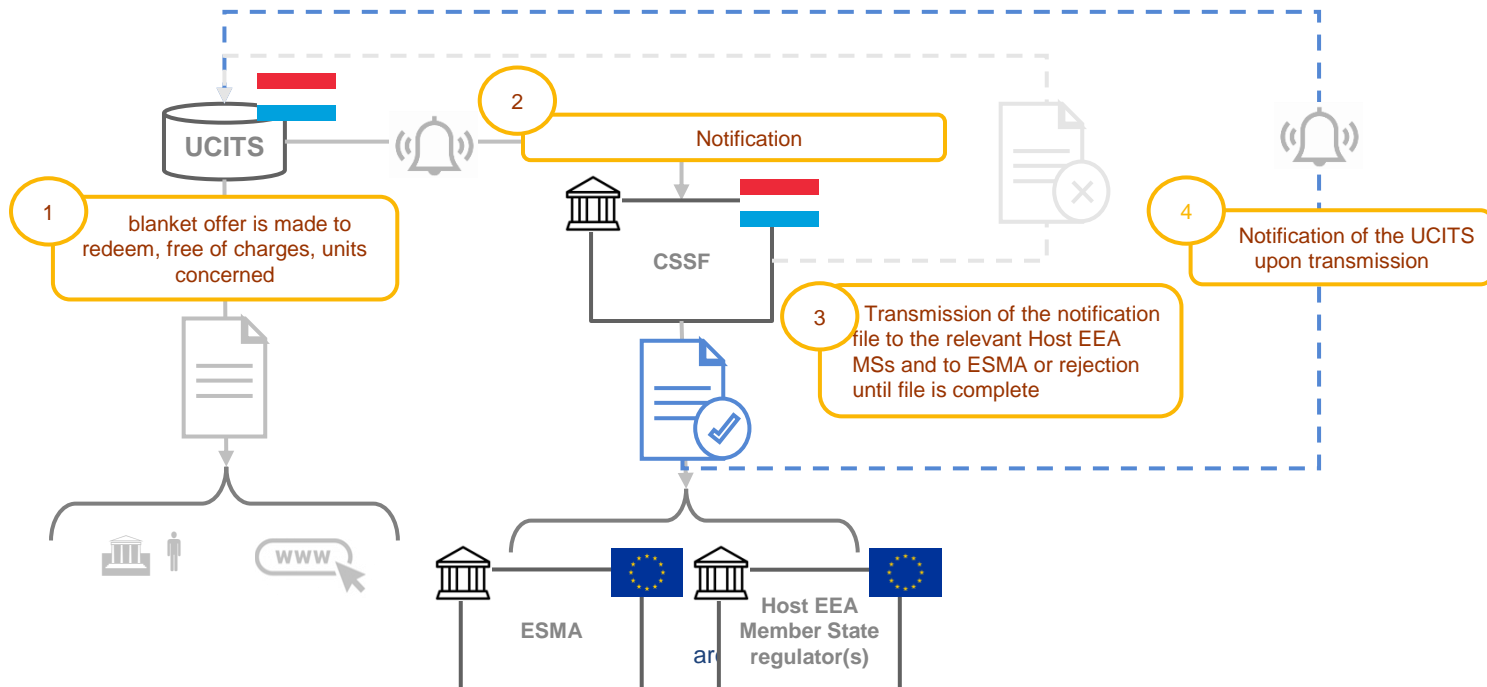
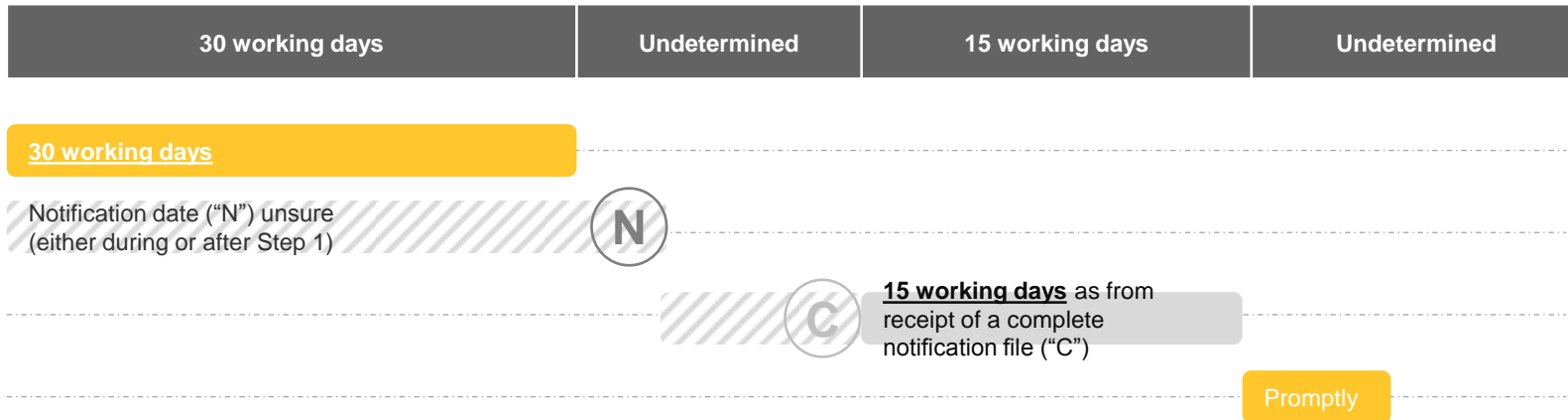
# MARKETING “DE-NOTIFICATION”

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# De-notification of marketing arrangements (mostly relevant to UCITS)

- Current situation
- Changes made by the CBDF:
  - Blanket offer for at least 30 working days to repurchase “free of any charges or deductions”
  - Make public the intention to terminate marketing and the consequences thereof
  - Termination or modification of contractual arrangements with financial intermediaries or delegates
  - Notification letter to the home MS regulator, for transmission to the host MS regulator within 15 days
  - In the case of AIFs, no subsequent pre-marketing for 36 months from the date of de-notification in the MS where marketing has been discontinued

# De-notification of marketing arrangements (mostly relevant to UCITS)



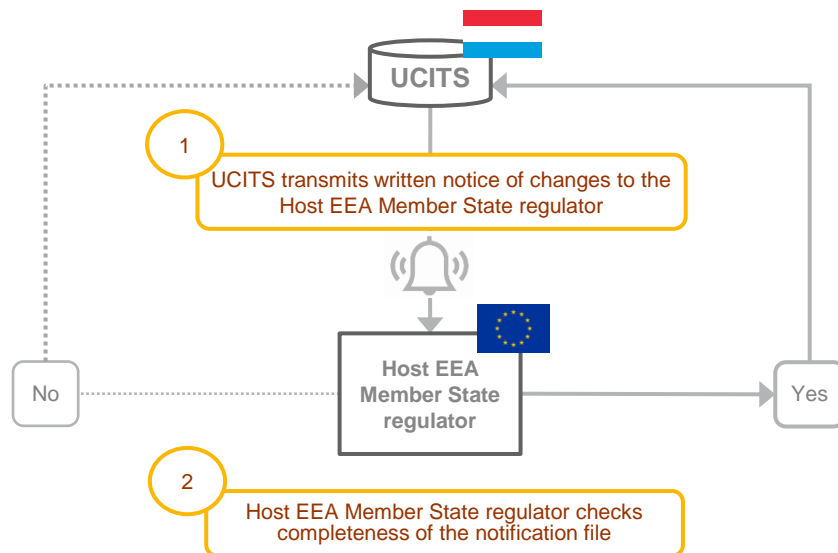
# UCITS MARKETING PASSPORT: MAINTENANCE PROCESS

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# UCITS passport maintenance: documents and/or notification letter update (incl. new share classes)

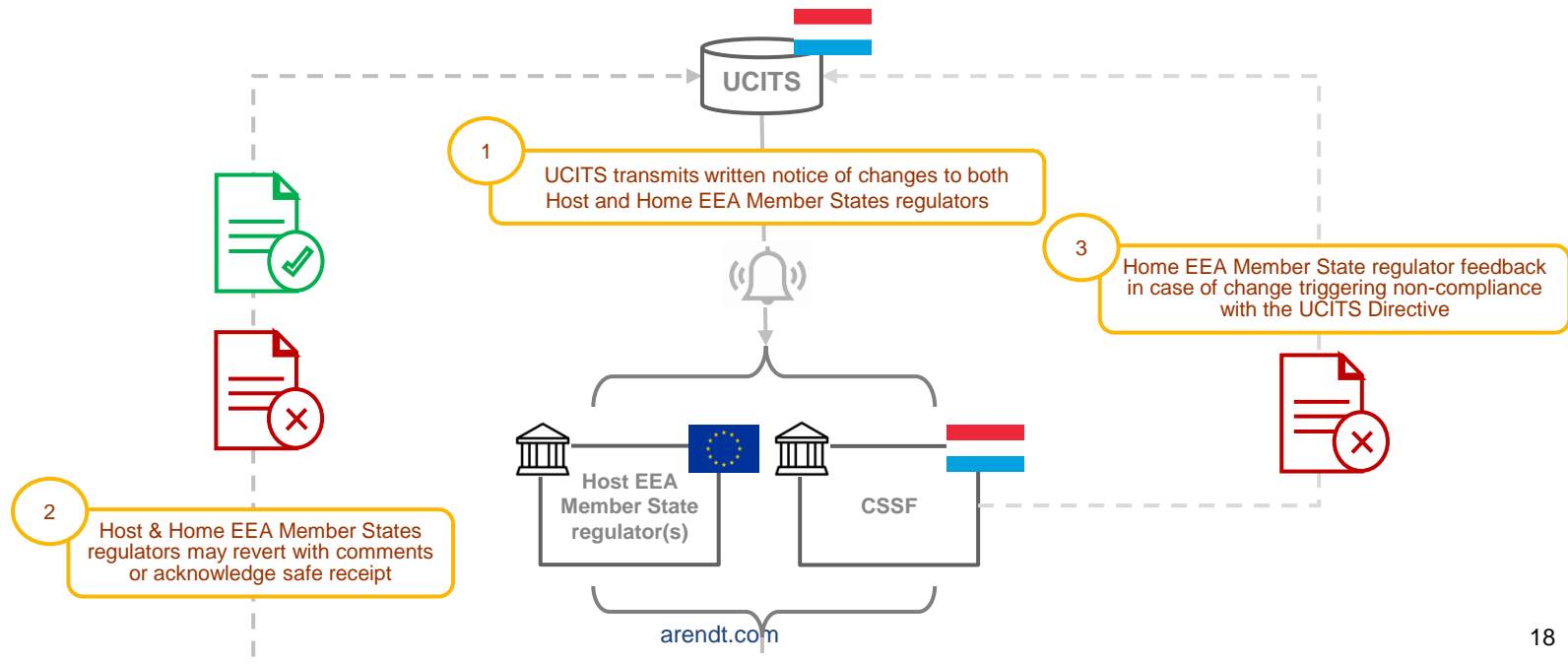
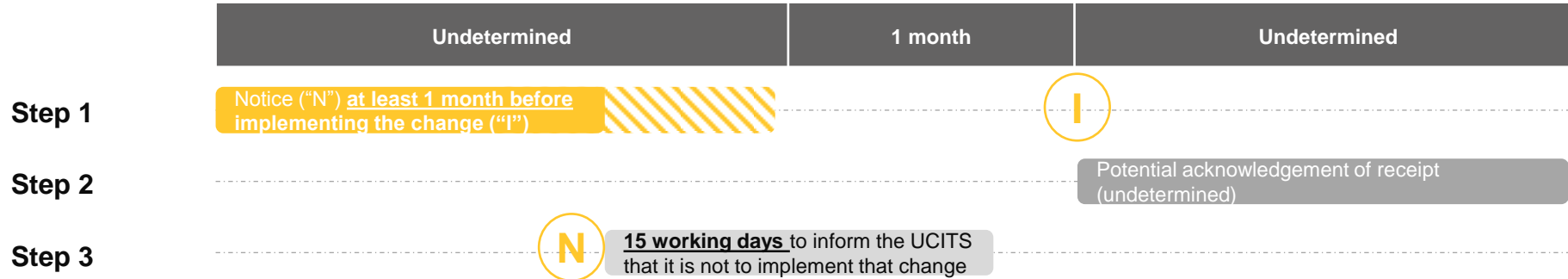
## ■ Current situation



- So-called “UCITS-to-Regulator” process
- The UCITS home MS is not involved
- Specific local requirements may apply (size of the email, specific naming convention rules, etc.)
- Fund documentation to be notified: constituting documents, prospectus, Annual and semi annual reports, KIIDs
- Particular events to be notified (share class liquidation, closure, marketing of new share class, change of local agent, etc.)

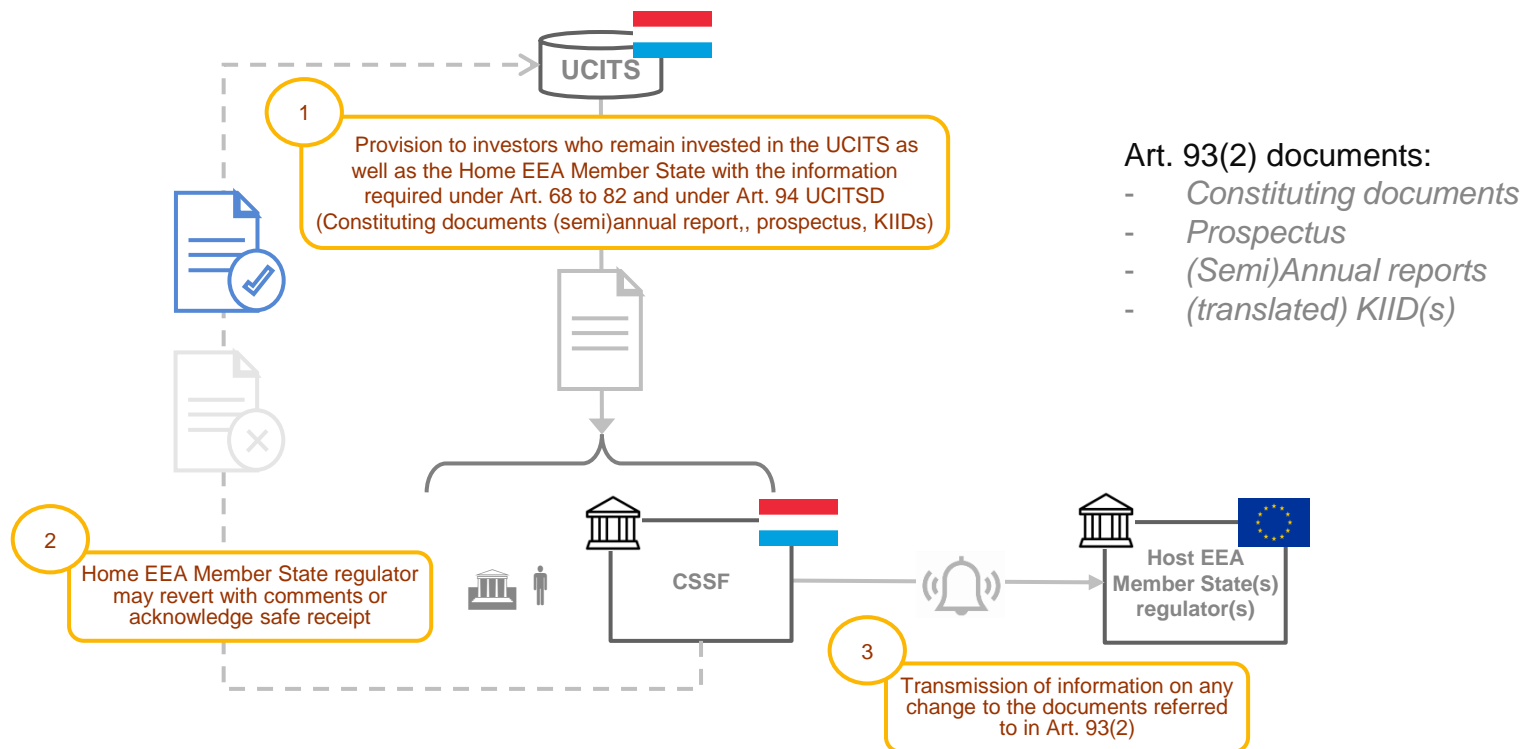
# UCITS passport maintenance: notification letter update (incl. new share classes)

## Future situation



# UCITS maintenance (UCITS de-notified)

## ■ Future situation





# MARKETING COMMUNICATIONS

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# Transparency requirements for marketing communications

- Current situation
- Changes made by CBDF:
  - All marketing communications need to be identifiable as such
  - Information must be clear, fair and not misleading
  - Must evenly describe the risks and rewards of purchasing units/shares
  - Must not contradict or diminish the significance of information contained in prospectus or KIID
  - National regulators to publish online and notify ESMA of:
    - ✓ Applicable provisions re: marketing requirements
    - ✓ Information on applicable fees

# Potential ex-ante verification of marketing communications

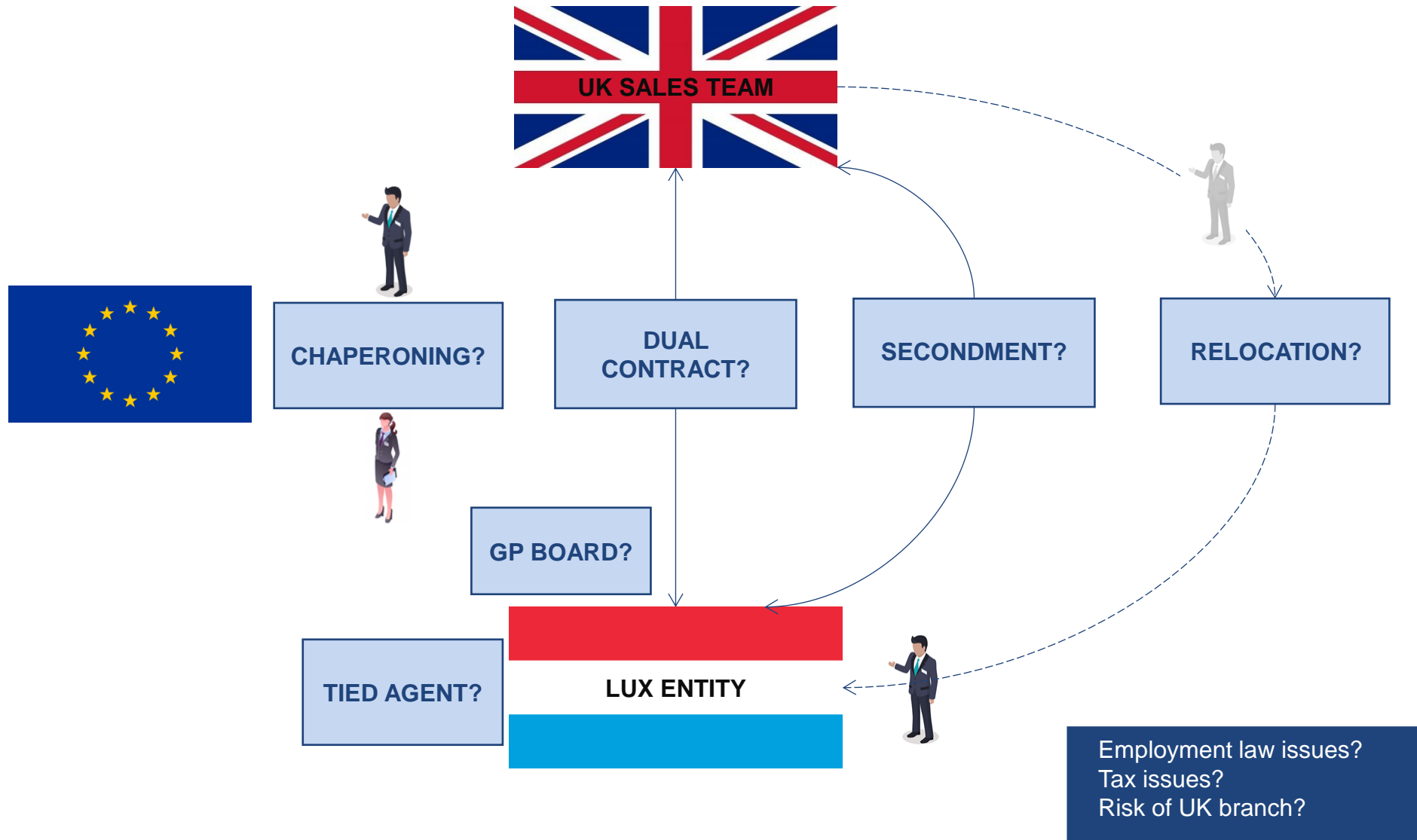
- New provisions under CBDF:
  - Possibility for MS regulators to require prior notification of marketing communications of UCITS and AIF marketed to retails
  - Response by the MS regulators within 10 working days stating if amendments required
  - Not a prior condition to marketing of units

# POST BREXIT MARKETING INTO THE EU/UK: CURRENT TRENDS

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# Brexit – Impact on UK-based sales teams targeting the EU

arendt





## Brexit – Impact on marketing into the UK?

- Current TPR
- What about post transition period (31 December 2020)?

# From distributing to offering funds in Switzerland

Caroline Clemetson



# Changes in the distribution regime under CISA in Switzerland

- The definition of distribution changed into offer and shifted from CISA to FinSA
- Distributors no longer authorised by FINMA as of January 1, 2020
- Introduction of the concept of offering in FinSA
- Offer of collective investment schemes considered as a financial service under FinSA
- Offer applies to all financial instruments defined in FinSA, but still specific rules for collective investment schemes
- No transitional period for the entering into force of the notion of offer that applies as of January 1, 2020

# Distribution under aCISA

- **Notion of Distribution** (art. 3 aCISA/art. 3 aCISO)
  - any offering of and advertising for collective investment schemes
    - Offering: concrete offer to enter into an agreement
    - Advertising: Use of any type of advertising means with content aiming at offering collective investment schemes (factsheet, roadshows, prospectus, etc.)
  - not deemed to be distribution according to art. 3 para. 2 (exceptions to the notion of distribution)
    - distribution directed at regulated financial intermediaries, reverse solicitation or management or advisory agreement
- **The notion of Distribution was abolished with the entry into force of the FinSA per 1.1.2020 and does no longer apply**
- **However, the consequences and regulatory obligations remain applicable during the transitional period until the entities shift to FinSA**

# Offer under FinSA

## – Notion of Offer under FinSA

- Any invitation to acquire a financial instrument that contains sufficient information on the terms of the offer and on the financial instrument itself (art. 3 let. g FinSA);
- The definition of «offer» has been precised in FinSO in order to clarify the fact that there is an offer without any type of advisory activity to a determined client if the aim is the acquisition or sale of a determined financial instrument.
- Exemptions (non exhaustive negative list under art. 3 para. 6 FinSO)
  - reverse solicitation
  - Publication of prices and tax data
  - Publication of provision of factual information (fact sheets)
  - Publication and provision of legally required documents and information such as invitations to general meetings

# Offer under FinSA (cont.)

- Same concept applicable to all financial instruments, not only funds – but different consequences for funds due to CISA
- Regulatory requirements are neutral from a technological point of view
- For funds, additional product specific conditions in CISA, notably 120 CISA for foreign collective investment schemes

# Consequences for the offer of collective investment schemes

## Fund “distribution” will constitutes an offer

- Requirement to have a prospectus (art. 48 ss FinSA)
- Requirement to publish a key information (KID) document in case of offer to retail clients (art. 58 ss FinSA)
- Product related requirements (CISA):
  - Swiss funds must be approved by FINMA
  - Foreign funds offered to non-qualified investors must be approved by FINMA and must have a Swiss representative and a Swiss paying agent
  - Foreign funds offered exclusively to qualified investors must no longer have a Swiss representative and a Swiss paying agent, except in case of an offer to HNWI

# Consequences for the offer of collective investment schemes (cont.)

**Fund distribution is considered to be a financial service as defined under art. 2 let. c FinSA**

- art. 3 para. 2 FinSO: any activity aimed directly at specific clients for the specific purpose of acquiring a fund
- SFAMA FAQ
  - One of the main purposes of art. 3 para. 2 FinSO was to clarify that pure funds distribution, i.e. activities which do not achieve the quality of investment advice, is also deemed to be a financial service
  - Any interaction that is potentially or actually an important element or cause of a specific investment decision by the client
  - Only interactions with end investors qualify as financial services under art. 2 para. 2 FinSO
  - An offer to a prudentially supervised financial intermediary is generally not regarded as a financial service (except if acquired for its nostro)



# Consequences for the offer of collective investment schemes (cont.)

## Consequences related to the provision of a financial service

- Client segmentation (art. 4 ff FinSA)
- Application of the code of conduct rules
  - Duty to provide information (art. 8 ff FinSA)
  - Appropriateness and Suitability (art. 10 ff FinSA)
  - Documentation and rendering of account (art. 15 ff FinSA)
- Organisational measures
  - appropriate organization with staff having the necessary skills, knowledge and experience (art. 21 f. FinSA)
  - Involvement of third parties and chain of providers (art. 23 f. FinSA)
  - conflicts of interest and third party compensation (art. 26 f. FinSA)
  - Staff transactions (art. 27 FinSA)

# Type of Investors - Qualified and Non-Qualified Investors

- Central notion, under the old (aCISA) and the new (FinSA) regime
- Distinction between qualified and non-qualified investors remains and is still relevant in case of distribution/offering of collective investment schemes
- Are deemed qualified investor under the revised CISA (art. 10 CISA):
  - professional clients under art. 4 para. 3 to 5 and art. 5 para. 1 and 4 FinSA:
    - a) financial intermediaries as defined in the BankA, FinIA and CISA
    - b) insurance companies
    - c) foreign clients subject to prudential supervision similar to a) and b)
    - d) central bank
    - e) public entities with professional treasury operations
    - f) occupational pension schemes with professional treasury operations and other occupational pension institutions with professional treasury operation
    - g) companies with professional treasury operations
    - h) large companies
    - i) private investment structures with professional treasury operations created for high-net-worth retail clients.

# Types of Investors

## Qualified and Non-Qualified Investors (cont.)

- Are deemed qualified investor under the revised CISA (art. 10 CISA):
  - professional clients under art. 4 para. 3 to 5 and art. 5 para. 1 and 4 FinSA
    - j) High-net-worth retail clients and private investment structures created for them may declare that they wish to be treated as professional clients (opting-out)
      - CHF 500'000 with knowledge, or
      - CHF 2 million
      - NB: assets to take into consideration defined under art. 5 FinSO
    - k) Swiss and foreign collective investment schemes and their management companies
  - clients under written asset management agreement or advisory agreement aimed at a long-term advisory relationship with a financial intermediary subject to the FinIA or the Banking Act or with a financial intermediary abroad subject to equivalent prudential supervision, unless they declare in writing that they do not wish to be considered as such (opting-in)



# QUESTIONS?

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## Luxembourg



### **Florence Stainier**

Partner - Investment Management  
Tel: +352 40 78 78 543  
Mob: +352 621 14 02 54  
Email: [Florence.Stainier@arendt.com](mailto:Florence.Stainier@arendt.com)



### **Catherine Rasseneur**

Partner – Arendt Regulatory Consulting  
Tel: +352 26 09 10 7742  
Mob: +352 66 14 51 226  
Email: [catherine.rasseneur@arendt.com](mailto:catherine.rasseneur@arendt.com)

## London



### **Camille Bourke**

Partner - Private Equity & Real Estate  
Tel: +44 (0) 20 7456 9803  
Mob: +44 7931 114 115  
Email: [camille.bourke@arendt.com](mailto:camille.bourke@arendt.com)

## Guest from Schellenberg Wittmer



### **Caroline Clemetson**

Partner – Investment Management  
Tel: +41 22 707 8090  
Email: [caroline.clemetson@swlegal.ch](mailto:caroline.clemetson@swlegal.ch)