

## CSSF clarifications and expectations on fund marketing communications under Luxembourg IFMs' responsibility

On 20 September 2022, the CSSF published a new **FAQ** providing guidance on fund marketing communications. The FAQ clarifies the CSSF expectations in relation to:

- article 4 of the **Regulation EU 2019/1156** on facilitating cross-border distribution of collective investment undertakings (the **CBDF Regulation**); and
- the **ESMA guidelines on marketing communications** (the **ESMA Guidelines**) which were implemented by **CSSF Circular 22/795** and entered into force on 2 February 2022;

(together the **Marketing Rules**).

Under article 4 of the CBDF Regulation, in scope entities are required to ensure that marketing communications are identifiable as such, describe risks and rewards in an equally prominent manner and are fair, clear and not misleading.

The FAQ:

- (i) provides helpful clarifications on the scope of application of the Marketing Rules to Luxembourg entities under CSSF supervision (see section 1 below);
- (ii) sets specific governance and organisational requirements in relation to marketing communications for Luxembourg in scope entities (see section 2 below); and
- (iii) sets reporting obligations to the CSSF in relation to marketing communications for Luxembourg in scope entities (see section 3).

### 1. SCOPE

- **Entities in scope:** the following Luxembourg entities are subject to the Marketing Rules and the FAQ:

- UCITS management companies;
- chapter 16 management companies; and
- authorised AIFMs<sup>1</sup> and authorised internally-managed AIFs,

(together **Luxembourg IFMs**).

The Marketing Rules and the FAQ do not apply to:

- Luxembourg registered AIFMs and registered internally-managed AIFs; and

<sup>1</sup> And managers of EuVECAs and EuSEFs.

- Luxembourg IFMs when acting as distributors or marketing intermediaries of AIFs or UCITS for which they are not the appointed IFM.<sup>2</sup>
- **Marketing communications in scope:** each Luxembourg IFM must assess which documents and messages qualify as marketing communications under the Marketing Rules. Neither the Marketing Rules nor the FAQ define the concept of “marketing communication”. IFMs should refer to the non-exhaustive list of marketing communications included in the ESMA Guidelines to make such assessment. The FAQ does not provide any additional guidance in that respect.
- **Marketing communications by distributors and marketing intermediaries:** a Luxembourg IFM must ensure that all marketing communications relating to funds under management comply with the Marketing Rules and the FAQ, irrespective of whether such communications are made by the Luxembourg IFM itself, by one of its delegates, by another marketing intermediary or by the fund itself. In other words, Luxembourg IFMs are responsible for all marketing communications prepared and released in relation to funds under management, notwithstanding the absence of any contractual relationship with the end-entity<sup>3</sup> in charge of marketing.
- **Investors in scope:** the Marketing Rules and the FAQ only apply to marketing communications addressed to investors or potential investors residing in the EEA. Therefore, marketing communications addressed to non-EEA investors are out of scope. For the avoidance of doubt, all marketing communications to EEA investors must comply with the Marketing Rules and the FAQ, even if they are exclusively addressed to professional investors.
- **Funds in scope:** marketing communications with respect to all (Luxembourg and foreign) UCITS or AIFs (and sub-funds thereof) managed by a Luxembourg IFM and notified for marketing on a cross-border basis in the EEA (outside of Luxembourg) or marketed in Luxembourg fall within the ambit of the Marketing Rules and the FAQ.

## 2. Governance and organisational requirements

Luxembourg IFMs must:

- implement appropriate measures to identify marketing communications as such;
- ensure that their senior management and/or internal control function is involved in the preparation and validation of marketing communications;
- ensure that marketing communications are reviewed and signed-off by at least two individuals (four-eyes principle);
- implement appropriate measures to ensure compliance of all marketing communications with article 4 of the CBDF Regulation by the distribution network. This process must be duly documented and must be implemented under the control of the IFM’s senior management;

<sup>2</sup> Being however provided that those Luxembourg IFMs may be indirectly caught by the Marketing Rules as the appointed IFM of the relevant funds will have to ensure compliance with the rules by distributors and market intermediaries (irrespective of whether the latter are delegates of the appointed IFM or not – see **ESMA Q&As on the application of the UCITS Directive** and **on the application of the AIFMD**, which both state that IFMs are responsible for ensuring compliance with the marketing communications requirements, including by marketing intermediaries or distributors which are not delegates of the IFM.

<sup>3</sup> And in particular irrespective of whether distributors or marketing intermediaries are appointed by the IFM or by the fund itself.

- ensure that all breaches of the Marketing Rules are reported by the compliance officer to the IFM's senior management as part of the Management Information and to the CSSF in the annual summary report on his/her activities;<sup>4</sup> and
- ensure consistency between the marketing communications and the fund legal documents.

The validation process of marketing communications may be implemented based on a risk-based approach (eg low-risk marketing communications may be reviewed by the marketing team only whilst high-risk marketing communications must also be reviewed by the compliance function).

It is further recommended that Luxembourg IFMs:

- use a robust automated system to support the preparation process; and
  - collect all marketing communications in one place for better management, notably via the use of relevant tools, such as data rooms or client relationship management tools.
- **Use of group resources and delegates:** a Luxembourg IFM may use group resources and third-party delegates in preparing and validating marketing communications, provided that the IFM ensures that the above conditions are met. In case of delegation, the IFM must (i) perform adequate oversight and (ii) enter into a contract with the delegate which specifies their respective duties in relation to compliance with the Marketing Rules.

### 3. CSSF reporting

- **Funds marketing communications:** Luxembourg IFMs are not subject to periodic reporting to the CSSF regarding marketing communications. However, Luxembourg IFMs must be able to provide upon request the following information to the CSSF regarding marketing communications for all funds under management:
- type of marketing communications used;
  - EEA countries of dissemination; and
  - targeted investors.

The CSSF may also request Luxembourg IFMs to provide without delay a copy of all marketing communications and any legal document in relation to all funds under management.

In addition, as of 1 April 2023, Luxembourg IFMs must be able to identify if the marketing communication entails sustainability-related information in the context of the application of article 13 of **SFDR** and the **ESMA Supervisory Briefing on sustainability risks and disclosures in the area of investment management**.

Therefore, Luxembourg IFMs should have systems in place allowing a quick retrieval of material communications (and related information) on a fund and sub-fund basis for all funds under management.

- **MiFID top-up licence – Marketing communications in relation to discretionary portfolio management (DPM) and investment advisory services:** the IFM holding a MiFID top-up shall be ready to share the same information on marketing communications upon CSSF's request (ie, type, countries of dissemination and targeted investors) in the context of the DPM or investment advisory services the IFM

<sup>4</sup> According to the FAQ, any breach to the ESMA Guidelines is to be considered as a breach to article 4 of the CBDF Regulation. For instance, the required disclaimer is not included in the marketing communications or there are inconsistencies between the expected returns disclosed in the marketing communication and the ones in the prospectus.

provides. While the CSSF refers only to such information in relation to financial instruments the IFM may be investing in/recommending, the MiFID provisions it refers to seem to indicate that information about any marketing communication relating to DPM/advisory services falls in the scope of these obligations (ie, a mere brochure promoting DPM/advisory services would fall in scope as well). In the same vein, while the CSSF does not specifically refer to the service of reception and transmission of orders (**RTO**) as being subject to the same requirement, a prudent approach would lead an IFM to maintain a data base with all relevant marketing communications used when providing RTO services under its MiFID top-up.

## Application Date

The Marketing Rules are already fully applicable. Therefore, there is no grandfathering period for complying with the FAQ.

## What should Luxembourg IFMs do?

The CSSF FAQ reminds Luxembourg IFMs that if the CSSF does not currently verify *ex-ante* marketing communications, it may request *ex-post* copies of marketing communications as well as certain information in relation thereof. The CSSF further expects Luxembourg IFMs to ensure compliance with the Marketing Rules of all marketing communications of all the funds under management and in scope of such rules.

To that end, Luxembourg IFMs are advised:

- to review and update if necessary their marketing communications policies and procedures;
- to review agreements with funds under management and ensure that the latter cause their distributors and marketing intermediaries to involve the Luxembourg IFM in the preparation of, and submit for validation to the Luxembourg IFM, all marketing communications;
- to prepare a compliance checklist with the ESMA Guidelines and ensure that designated employees or delegates are in charge of reviewing and validating marketing communications; and
- to have systems in place to identify marketing communications which entail sustainability-related information and to verify that these marketing communications do not contradict SFDR pre-contractual or periodic disclosures in accordance with article 13 of SFDR.

As a reminder, the ESMA Guidelines provide examples of what constitutes marketing communications or not:

Examples of marketing communications	Examples of communications which are not marketing communications
✓ All advertisements for a UCITS/AIF, regardless of medium (includes press articles, webpages, radio messages, video presentations, factsheets)	✗ Information or communication issued during pre-marketing activities
✓ Messages broadcast on social media which refer to characteristics of an AIF/UCITS, including its name	✗ Legal and regulatory documents/information of a fund (eg constitutive documents, prospectus, offering memorandum)
✓ Materials addressed to investors and documents or presentations made publicly available	✗ Corporate communications broadcast by fund manager which don't refer to specific UCITS/AIF

<p>✓ Communications advertising UCITS/AIF addressed to investors in both home and host Member States</p>	<p>✗ Short messages broadcast online (which only include a link to a marketing communication with no information on a specific UCITS/AIF)</p>
<p>✓ Communications by third parties which are used by a fund manager for marketing purposes</p>	

If you have any questions about the topics in this alert, or about marketing communications more generally, please get in touch with your usual A&O contact.

For further information on the topic, please reach out to your usual A&O contact, or any of the relevant contacts below.

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