



# CSSF FAQ - Cross Border Distribution of Funds - GUIDANCE ON MARKETING COMMUNICATIONS

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- 3.4 Which documents or information may be requested by the CSSF as part of the verification conducted by the CSSF in order to verify compliance with the applicable requirements under article 4 of the CBDF Regulation and the ESMA Guidelines? 11

### **Context:**

The present document refers to a list of questions & answers (FAQs) in relation to a number of key aspects of the **application of article 4 of the CBDF Regulation** and ESMA Guidelines with the objective to bring further clarity on the supervisory expectations of the competent authority.

This document will be updated from time to time and the CSSF reserves the right to alter its approach to any matter covered by the FAQs at any time. The entities concerned should regularly check the website of the CSSF in relation to any matter of importance to them to see if questions have been added and/or positions have been altered.

The present FAQs are to be read in conjunction with ESMA Guidelines as well as questions and answers to be published by ESMA with respect to **marketing communications** ("MCs"), if any. In this context, the CSSF refers to the information made available by ESMA on the following website: <http://www.esma.europa.eu>.

### **Definitions, abbreviations and acronyms:**

"CBDF": Cross Border Distribution of Funds;

"CBDF Regulation": Regulation (EU) 2019/1156 of the European Parliament and of the Council of 20 June 2019 on facilitating cross-border distribution of collective investment undertakings and amending Regulations (EU) No 345/2013, (EU) No 346/2013 and (EU) No 1286/2014;

"Circular 22/795": Circular CSSF 22/795 of 31 January 2022 on the application of ESMA Guidelines;

"ESMA Guidelines": Guidelines of ESMA on marketing communications (ESMA34-45-1272) under the CBDF Regulation published on 2 August 2021;

"Funds": collective investment undertakings;

"IFM": Investment Fund Manager;

"MC": Marketing communication within the meaning of article 4 of the CBDF Regulation;

"MiFiD II Directive": Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU;

"SFDR": Regulation (EU) 2019/2088 of the European Parliament and of the Council of 27 November 2019 on sustainability-related disclosures in the financial services sector, as amended.

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## 1. Scope

### 1.1 Which Luxembourgish entities are in the scope of article 4 of the CBDF Regulation?

All Investment Fund Managers (“IFMs”) listed under “2. *Scope of application*” of Circular 22/795 are in the scope of article 4 of the CBDF Regulation and of the ESMA Guidelines in relation to the Funds they manage, i.e.:

- management companies incorporated under Luxembourg law and subject to Chapter 15 of the Law of 17 December 2010 relating to undertakings for collective investment (“2010 Law”);
- management companies incorporated under Luxembourg law and subject to Article 125-2 of Chapter 16 of the 2010 Law;
- investment companies which did not designate a management company within the meaning of Article 27 of the 2010 Law;
- alternative investment fund managers authorised under Chapter 2 of the Law of 12 July 2013 on alternative investment fund managers (“2013 Law”);
- internally managed alternative investment funds (“AIFs”) within the meaning of point (b) of Article 4(1) of the 2013 Law;
- managers of European qualifying venture capital funds (“EuVECA”) within the meaning of Regulation (EU) No 345/2013;
- managers of European qualifying social entrepreneurship funds (“EuSEF”) within the meaning of Regulation (EU) No 346/2013.

For the avoidance of doubt, article 4 of the CBDF Regulation shall not apply as such to IFMs that act as a distributor or as an intermediary for Funds that they do not manage, although they may be impacted by this article.

In this context, please also refer to the answer to question 1.5 below.

### 1.2 Which documents or messages should be understood under the term “marketing communications”?

The IFM shall assess, on the basis of article 4 of the CBDF Regulation and of the examples mentioned in section 1 of the ESMA Guidelines, whether a document or a message advertising for a UCITS or an AIF qualifies as an MC. As an example, Funds factsheets qualify in principle as MCs and should be identified/flagged as such. Messages broadcasted on any social media platform may also qualify as MCs if they fulfil the elements referred to in the ESMA Guidelines.

On that basis, IFMs shall define and identify/flag the documents which qualify as MC within the meaning of article 4 of the CBDF Regulation and ESMA Guidelines.

### **1.3 Which Funds are in scope of article 4 of the CBDF Regulation?**

All UCITS and AIFs, including when they are set up as EuVECAs, EuSEFs, ELTIFs and MMFs managed by an IFM listed under "2. *Scope of application*" of Circular 22/795 and question 1.1 above, are in scope of article 4 of the CBDF Regulation.

This means that:

- MCs addressed to investors or potential investors of regulated and non-regulated Funds managed by an IFM listed under question 1.1 are in scope.
- MCs addressed to investors or potential investors of Luxembourgish and non-Luxembourgish Funds managed on a national, respectively cross border basis by an IFM listed under question 1.1, are in scope.

MCs addressed to investors or potential investors which are not resident in the EEA are not in scope of article 4 of the CBDF Regulation.

### **1.4 Which investors should be understood under the term "investors and potential investors"?**

"Investors and potential investors" should be understood in a broad sense, i.e. referring to already existing investors in the relevant (sub-)fund as well as to entities or persons that may become investors in such (sub-)fund.

Please also refer to question 1.7 below.

### **1.5 Are the distributors or intermediaries involved in the distribution of Funds managed by the IFM impacted by article 4 of the CBDF Regulation?**

Please refer to Question 1, Section XIII of ESMA's Questions and Answers on the application of the UCITS Directive (UCITS) as well as to Question 4, Section VIII of ESMA's Questions and Answers on the application of AIFMD (AIFMD) which provide that:

*"Fund managers are responsible for the compliance with Article 4 of Regulation (EU) 2019/1156, irrespective of who is the actual entity marketing the fund, and of the relationship it has with the third party distributor (whether it is contractual or not)."*

In this context, IFMs are also advised to consult the relevant sections on delegation and organisation of the marketing function provided by Circular CSSF 18/698 on the authorisation and organisation of investment funds managers incorporated under Luxembourg law.

**1.6 Are MCs in relation to a Luxembourgish or non-Luxembourgish EU Fund which is managed by a Luxembourgish IFM and distributed only in Luxembourg in scope of article 4 of the CBDF Regulation?**

YES, since the CSSF considers that article 4 of the CBDF Regulation does not limit the scope to Funds which have been solely notified for distribution on a cross border basis, but also includes Funds which are distributed in Luxembourg.

**1.7 Are MCs targeting professional investors in scope of article 4 of the CBDF Regulation?**

YES, as no exemption is foreseen by the CBDF Regulation, MCs addressed to all types of investors or potential investors of UCITS and AIFs, including when they are set up as EuVECAs, EuSEFs, ELTIFs and MMFs, are in scope.

**1.8 When did the CBDF Regulation and ESMA Guidelines enter in force?**

According to article 19 of the CBDF Regulation, article 4 (1) to (5) of the CBDF Regulation apply since 2 August 2021. Consequently, the obligations stated in article 4 whereby “[IFMs]... shall ensure that all marketing communications addressed to investors are identifiable as such and describe the risks and rewards of purchasing units or shares of an AIF or units of a UCITS in an equally prominent manner, and that all information included in marketing communications is fair, clear and not misleading (...)”, have been applicable since this date, despite the fact that precisions were given at a later stage by means of the ESMA Guidelines.

ESMA Guidelines, as adopted by the CSSF via Circular 22/795, apply since 2 February 2022, as stated in Circular 22/795.

## **2. Governance & organisation of the IFM**

**2.1 To which extent shall the IFM be involved in the process of preparation and validation of MCs?**

As a prelude, the IFM shall define and implement measures that allow it to identify and flag an MC as such.

The IFM shall be involved in the process of preparation and validation of MCs through its senior management and/or its internal control functions. By “involvement of the IFM”, it is meant that the following requirements shall be met:

- The IFM must be organised in a way that a review of MCs in accordance with the four-eyes principle can always be ensured. The senior management and/or the internal control functions should make sure that a sign-off process based on the four-eyes principle is in place and applied as part of the oversight;
- As part of its follow-up duties of the distribution network of UCIs, as laid down under point 92 of CSSF Circular 18/698, the executive committee of the IFM must implement procedures and arrangements allowing it to ensure compliance of MCs with article 4 of the CBDF Regulation;
- In addition, compliance with article 4 of the CBDF Regulation should be part of the report of the compliance officer of the IFM which is required under point 260 of CSSF Circular 18/698. Breaches of compliance of MCs in respect of this article 4 of the CBDF Regulation have to be reported to the senior management of the IFM as part of the *Management Information*;
- The IFM should ensure especially a proper validation of the consistency between MCs and legal and regulatory documents, as foreseen under article 4 of the CBDF Regulation and points 18 to 21 of the ESMA Guidelines.

A risk-based approach, where MCs are scored based on the assessed risks, may be implemented as part of the validation process of MCs. In this case, the methodology used for the risk-based approach (i.e.: determination of a risk rating of MCs depending on risks factors, such as the typology of MC) must be defined and approved by the senior management of the IFM. As an example, the review of a low-risk MC could be carried out by the marketing team and the review of a high-risk MC could be carried out by marketing and compliance of the IFM.

The use of committees at group level where the IFM is represented may be considered.

The use of a robust automated system for the preparation of MCs can support this process.

In order to better manage the MCs, the IFM may use tools, such as data rooms and CRM tools to help compile all the MCs into one place.

## **2.2 To which extent may an IFM take into account transversal or specific skills existing within the group to which it belongs or third parties when preparing and validating MCs?**

The IFM may consider transversal or specific skills existing within the group to which it belongs or third parties when preparing and validating MCs.

If some tasks relating to the preparation and/or the validation of MCs are done by other units or entities of the group or third parties, the IFM is not expected to replicate those tasks. However, the IFM shall ensure that the conditions laid down under question 2.1 above are continuously met.



### **2.3 Can the IFM delegate the preparation of MCs?**

YES, the IFM can delegate some or all tasks related to the preparation of MCs. In this case, the IFM has to perform an adequate oversight of the delegate(s). The delegation contract shall clarify the respective duties of the IFM and the delegate in relation to compliance with article 4 of the CBDF Regulation.

### **2.4 Which elements shall be integrated in the marketing procedure as part of the application of the CBDF Regulation?**

The marketing procedure of the IFM, as referred to under point 520 of CSSF Circular 18/698, shall be amended to reflect, among other things, the process of identification/flagging of a document or a message that qualifies as an MC.

Moreover, the process of ensuring compliance with article 4 of the CBDF Regulation, also considering the CSSF expectations in terms of governance and organisation set out as part of the answers to the present FAQ, shall be duly documented by the IFM.

### **2.5 Do you have examples of breaches of article 4 of the CBDF Regulation?**

Any non-compliance with the requirements of article 4 of the CBDF Regulation and of the ESMA Guidelines, as adopted by the CSSF via Circular 22/795, is considered as a breach of article 4 of the CBDF Regulation.

In practice, any MC which promotes, for example a high return, while the Fund documentation presents a more conservative approach, might be assessed as not compliant.

An MC which does not include a proper disclaimer that the communication is an MC within the meaning of the CBDF Regulation, as required by points 6 to 10 of the ESMA Guidelines, will be assessed as a breach of article 4 of the CBDF Regulation.

## **3. Information on marketing communications to be provided by IFMs to the CSSF**

### **3.1 Are IFMs subject to a periodic reporting to the CSSF with regards to MCs?**

NO, IFMs shall provide the required information (as further described under the answer to question 3.2.) upon request. No periodic reporting to the CSSF is implemented.

### **3.2 What kind of information should be provided to the CSSF upon request?**

IFMs in scope of Circular 22/795 shall, as from 16 September 2022, be ready to provide the following information with regards to the MCs used in relation with the Funds under their management:

- Types of MC used;
- Country(ies) of dissemination of the MC (EEA only);
- Targeted investors.

This information should be provided upon request.

As of 1 April 2023, IFMs in scope of Circular 22/795 must be able to link the above information to their relevant Fund(s) (respectively sub-funds) and identify if the MC entails information with regards to ESG in the context of the application of article 13 of SFDR and of the ESMA Supervisory briefing on Sustainability risks and disclosures in the area of investment management (ESMA34-45-1427).

### **3.3 Should an IFM with top-up MiFiD license also provide information on MCs in relation to the services of Discretionary Portfolio Management and Investment Advice?**

YES, notwithstanding the fact that Discretionary Portfolio Management and Investment Advice are not in scope of the CBDF Regulation, IFMs with a top-up MiFiD license shall be ready to provide the following information on MCs with regards to Discretionary Portfolio Management and Investment Advice services:

- Type of MC used;
- Country(ies) of dissemination of the MC (EEA only);
- Targeted investors.

This information is in relation to all financial instruments referred to in appendix 1 section C of the MiFiD II Directive in the context of the application of article 24 (3) of the MiFiD II Directive and article 44 of the Commission Delegated Regulation (EU) 2017/565 of 25 April 2016 supplementing Directive 2014/65/EU of the European Parliament and of the Council, as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive.

**3.4 Which documents or information may be requested by the CSSF as part of the verification conducted by the CSSF in order to verify compliance with the applicable requirements under article 4 of the CBDF Regulation and the ESMA Guidelines?**

The CSSF may request a copy or reproduction of any MC linked to a Fund managed by a Luxembourgish IFM in scope of Circular 22/795 and addressed to investors or potential investors in the EEA as part of its verification process.

In addition, any legal and regulatory Fund documents, as described under point 18 of the ESMA Guidelines, may be requested by the CSSF. This includes, for example, the key information document (“KID”) under PRIIPs Regulation (EU) n°1286/2014 or the documents foreseen under article 23 of Directive 2011/61/EU on alternative investment fund managers. The IFM must be able to provide the CSSF with those documents without delay.



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