

CSSF guidance on marketing communications

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On 12 October 2022, the CSSF updated its FAQ on CBDF Marketing Communications ("**CSSF FAQ**"). The objective of this FAQ is to provide additional guidance to Luxembourg IFMs on certain key aspects of the marketing communication ("**MC**") requirements under Article 4 of the CBDF Regulation and ESMA Guidelines on marketing communications ("ESMA Guidelines"), which were implemented by the CSSF in its Circular 22/795.

The key points of the CSSF FAQ, as amended in October 2022, are addressed below:

1. Scope of MC Requirements

In-Scope IFMs:

- All Luxembourg IFMs listed in CSSF Circular 22/795 ("**In-Scope IFMs**") must comply with the MC requirements under Article 4 of the CBDF Regulation and ESMA Guidelines ("**MC Requirements**"), which include e.g., UCITS management companies ("UCITS ManCos") and authorised AIFMs.
- In-Scope IFMs are subject to MC Requirements in respect of their collective portfolio management activities. However, IFMs with a top-up MiFID licence must also be able to provide the CSSF with certain information on their MC in relation to their discretionary portfolio management and investment advice services.
- Non-EU AIFMs and sub-threshold AIFMs are not covered by the scope of MC Requirements pursuant to the CSSF FAQ and CSSF Circular 22/795.

In-Scope funds and investors

- MC in respect of all UCITS and all AIFs managed by In-Scope IFMs are subject to MC Requirements, regardless of their regulated/non-regulated funds status, their

Luxembourgish/non-Luxembourgish nationality, or whether they are managed and/or marketed on a cross-border or national basis only by In-Scope IFMs.

- MC of UCITS/AIFs addressed to existing and/or potential investors as well as to retail and/or professional investors are in scope of MC Requirements, but MC addressed to (potential) investors not located in the EEA are not in scope of MC Requirements.

Distributors

- Distributors/intermediaries, including UCITS ManCos/AIFMs acting as distributors for UCITS/AIFs that they do not manage (i.e. delegated UCITS ManCos/AIFMs), are not directly in scope of MC Requirements under Article 4 of CBDF Regulation, and the CSSF repeats that it is the responsibility of the In-Scope IFMs managing the relevant UCITS/AIFs to ensure compliance with these MC Requirements as well as with the applicable requirements of CSSF Circular 18/698 in respect of the organisation and delegation of the marketing function.
- The CSSF also refers to ESMA's Q&A on the application of the UCITS Directive and its Q&A on the application of the AIFMD as of 20 July 2022, according to which In-Scope IFMs will be responsible for ensuring compliance with MC Requirements "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)".

2. Governance and organisational requirements of IFMs

MC Identification, Preparation and Validation Process and Related Procedures

- In-Scope IFMs must define and implement MC identification measures and procedures allowing them to identify/flag whether or not a document/communication qualifies as MC as such.
- In-Scope IFMs must be involved in the MC preparation and validation process through their senior management and/or internal control functions, which will imply the implementation of appropriate compliance procedures and arrangements for the review and sign-off of MC in accordance with the four-eye principle, as further detailed by the CSSF in its FAQ.
- In-Scope IFMs are expected to duly document the above processes of ensuring compliance with MC Requirements, and to update their marketing procedure to reflect, amongst other things, their MC identification process.

Delegation and/or support from group/third parties

- Delegation by In-Scope IFMs to group/third parties of some or all tasks relating to the preparation (not the validation) of MC is possible, subject to adequate oversight of the

delegate(s) and to appropriate delegation agreement.

- In-Scope IFMs may also consider transversal or specific skills of the group/third parties when preparing and validating MC, and are not required to replicate tasks already performed by others (provided that all the conditions pertaining to the In-Scope IFM's involvement in the preparation and validation process of MC are continuously met).

3. Information on MC to be provided to the CSSF

Collection of Information:

- As from 16 September 2022, In-Scope IFMs (as well as Top-up IFMs in respect of their MiFiD activities) must be able to provide information to the CSSF upon request with respect to (i) the type of MC used (e.g., factsheet, brochure, press article, etc.), (ii) the EEA countries of dissemination and (iii) the targeted investors (i.e., retail, professional or both).
- As from 1 January 2023¹, In-Scope IFMs must be able to link the above information to the relevant UCITS/AIF managed, and to identify whether the MC entails ESG information.

Verification of MC

- In-Scope IFMs must be able to provide the CSSF without delay when requested with a copy/reproduction of any MC linked to a UCITS/AIF managed and addressed to (potential) investors in the EEA as well as with any legal and regulatory fund documents (including for instance the PRIIPs KID).
- Any non-compliance with the MC Requirements is considered by the CSSF to be a breach of Article 4 of the CBDF Regulation, which may potentially expose In-Scope IFM to sanctions by the CSSF as per Article 14 of the CBDF Regulation.

1 The initial date set by the CSSF was 1 April 2023 but on 12 October 2022, the CSSF modified its FAQ and indicated the date of 1 January 2023 instead of 1 April 2023.

For any further information please contact us or visit our website at www.elvingerhoss.lu.

The information contained herein is not intended to be a comprehensive study or to provide legal advice and should not be treated as a substitute for specific legal advice concerning particular situations.

We undertake no responsibility to notify any change in law or practice after the date of this newsletter

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