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NEW EU CROSS BORDER DISTRIBUTION RULES FOR AIFS

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This article does not constitute legal advice and does not intend to be exhaustive; it only contains the authors' view on its content.

In 2011, the adoption of the AIFMD[1] brought the benefit of a long-awaited uniform marketing passport to the alternative investment funds' (**AIF**) market, allowing EU authorized alternative investment fund managers (**AIFMs**)[2] to distribute the AIFs[3] that they manage to professional investors in the European Economic Area (**EEA**)[4].

This initiative was long awaited for by the industry and became an immense success, akin to the historical success of the UCITS distribution passport. The marketing regime implemented by the AIFMD has proved to be robust and widely used by asset managers in the EEA. At the end of 2018, AIFs accounted for around 40% of the EU fund industry (compared with one third in 2017). Most AIFs had access to the AIFMD passporting regime (76%), allowing AIFs to be sold throughout the EU, while professional investors accounted for around 84% of the total net asset value of EU AIFs (+3pp compared with 2017).[5]

Despite an efficient framework, practice has shown that several issues unaddressed by the AIFMD have resulted in the application of diverging rules by Member States that alter the uniform distribution of AIFs in the single market.

In furtherance of its Capital Markets Union initiative, the EU Commission had set as an objective to further facilitate the marketing of funds in the EU, and to remove "certain barriers [that] still hamper the ability of fund managers to fully benefit from the internal market".[6]

In an effort to mitigate these barriers, the EU adopted Directive (EU) 2019/1160 of June 20, 2019, amending Directives 2009/65/EC and 2011/61/EU with regards to cross border distribution of collective investment undertakings (the "**Cross Border Directive**" or **CBD**) as well as Regulation (EU) 2019/1156 of June 20, 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 (the "**Cross Border Regulation**" or **CBR**).

The new rules of the CBD and CBR will impact both UCITS' and AIFs', with the aim of achieving a level playing field in the distribution of both types of funds on several matters. However, this article will only focus on the main changes to the AIFMD and their practical impact for AIFMs.

Both the CBD and the CBR will apply from August 2, 2021. In order to transpose the CBD in Luxembourg, a Bill of Law no 7737 has been submitted to Parliament which will amend the Luxembourg law of July 12, 2013, on alternative investment fund managers (the "**AIFM Law**").

1. Directive 2011/61/EU of the European Parliament and of the Council of June 8, 2011, on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010, O.J., L 174, 1 July 2011, as amended (the "**AIFMD**" and, as further amended by the Directive, the "**AIFMD (New)**").
2. Alternative investment funds managers, as defined in Article 4(1)(b) of the AIFMD.
3. Alternative Investment Funds, as defined in Article 4(1)(a) of the AIFMD.
4. The European Economic Area, currently including Austria, Belgium, Bulgaria, Croatia, Republic of Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, and Sweden (the "**EEA**").
5. ESMA Annual Statistical Report, EU Alternative Investment Funds 2020, January 10, 2020, ESMA50-165-1032.
6. CBD, Recital (1).

The CBD and the CBR will introduce a series of changes to the AIFMD including: new harmonised rules for pre-marketing AIFs to AIFMs (1), a procedure for discontinuing marketing of AIFs (2), clarifications with respect to additional local marketing requirements (3), and additional rules applicable to marketing documents and procedures (4).

I. PRE-MARKETING OF AIFS

Despite the AIFMD marketing passport having considerably eased the cross-border distribution of AIFs in the EEA, completion of a full-notification procedure in Luxembourg can take several weeks.

These delays are challenging for AIFMs that evolve in a very competitive environment. As a result, a practice has developed of providing draft documents to investors before completion of these notification formalities to test business appetite for the AIF, and to allow investors to review these documents pending receipt of the marketing passport.

This practice is generally referred to as "pre-marketing" and is subject to different rules depending on each Member State.

In this section, we will examine (A) how pre-marketing is currently conducted, and (B) the new rules of the CBD on pre-marketing and their likely impact for AIFMs.

A. Pre-Marketing of AIFs Before the CBD

The AIFMD provides AIFMs with a passport for marketing AIFs to professional investors in the EU. "Marketing" is defined by the AIFMD as "a direct or indirect offering or placement, at the initiative of the AIFM or on behalf of the AIFM, of units or shares of an AIF it manages, to or with investors domiciled with a registered office in the European Union".[7]

This definition of marketing has been criticised for its lack of guidance on what activities in practice fall within its scope, and on what communications could be sent to investors without being deemed marketing. Considering this vacuum, each Member State has developed its own interpretation of this marketing concept.

Therefore, under current rules, before engaging in any communication with investors, an AIFM needs to check country-by-country what documents or information (if any) an AIFM is permitted to send to investors in a given Member State in advance of completing a marketing notification, and what conditions apply.

In Luxembourg, the *Commission de Surveillance du Secteur Financier* (the **CSSF**) provided guidance in its FAQ on AIFMD.[8] According to the CSSF, marketing in Luxembourg occurs "when the AIF, the AIFM or an intermediary on their behalf seeks to raise capital by actively making units or shares of an AIF available for firm purchase by a potential investor".[9]

Based on the foregoing, AIFMs may distribute documents relating to an AIF to investors[10] before a marketing notification is completed, provided that these documents are in draft form and do not allow an investor to subscribe to the AIF before the marketing passport is obtained.[11] The provision of draft documents in those circumstances is generally referred to as pre-marketing.

B. The New AIFMD Definition of Pre-Marketing and Its Implications

In order to harmonize practices, the CBD amended the AIFMD by including the following definition of pre-marketing:

> "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 Union in order to test their interest in an AIF or a compartment which is not yet established, or which is established, but not yet notified for marketing in accordance with Article 31 or 32, in that Member State where the potential investors are domiciled or have their registered office, and which in each case does not amount to an offer or placement to the potential investor to invest in the units or shares of that AIF or compartment".[12]

This definition does not contrast fundamentally with the current understanding of pre-marketing in the Luxembourg AIF industry. However, whilst a harmonised definition of what constitutes pre-marketing is welcome and

7. AIFMD, Art. 1(9).
8. CSSF – Luxembourg Law of July 12, 2013, on alternative investment fund managers – FAQ, as amended (the "**CSSF FAQ on AIFMD**").
9. CSSF FAQ on AIFMD, question 21-A.
10. CSSF FAQ on AIFMD, question 22-B.
11. CSSF FAQ on AIFMD, question 22-C.
12. AIFMD (New), Art. 4(1)(aea).

might simplify compliance assessments by AIFMs, the CBD also introduces new requirements that may considerably affect the manner in which pre-marketing was performed until now by AIFMs.

1. Prohibition to Communicate Subscription Documents During Pre-Marketing

One of the main conditions to pre-marketing under the CBD is that investors should not be able to subscribe to an AIF until a formal marketing passport is obtained for that AIF.

As noted under Section A above, this limitation already existed under Luxembourg's regulatory practice but Article 30a(1)(b) AIFMD will go one step further by prohibiting the distribution of subscription documents or similar documents during pre-marketing, even in draft form.[13]

This strict prohibition will be challenging for AIFMs given the importance of the subscription agreement for investors and for certain AIFs. Indeed, the subscription documents contain a number of forms and representations which investors are keen to review prior to investing and which takes time for investors to complete.

AIFMs will need to monitor regulators' tolerance around this requirement and whether they would deem the provision of extracts and information forms, but not of the full subscription agreement, as an acceptable compromise.

2. Conditions for Communicating Draft Constitutional and Offering Documents

The CBD does not prohibit the communication to potential investors of draft constitutional documents or prospectuses during the pre-marketing phase of an AIF, provided that these documents are not sufficient to allow an investor to subscribe to shares in the AIF.

To that end, these documents shouldn't be in a final form and should clearly state that they do not constitute an offer or invitation to subscribe for units or shares of an AIF, and that information presented therein should not be relied upon because it is incomplete and may be subject to change.[14]

Unlike for subscription agreements, this requirement does not seem to deviate too much from current practice, since AIF documents provided on a pre-marketing basis usually contain similar language drawing attention of investors on risk of change.

It is uncertain whether Member States, when transposing the CBD or through regulatory practice, will seek to regulate more closely the content of draft AIF documents provided in the context of pre-marketing.

3. Further Limitation on Reverse Solicitation

The CBD[15] provides that any subscription within 18 months of the AIFM having begun pre-marketing shall be considered the result of "marketing".[16] It shall, therefore, not be possible for an AIFM to accept a subscription based on "reverse solicitation" following the start of pre-marketing activities.

This should not materially impact current practices of prudent AIFMs with respect to specific AIFs for which AIF documents had been provided on a pre-marketing basis.[17] However, the CBD goes one step further by referring to information or communications to investors on "investment ideas" or "investment strategies", which goes beyond reference to a particular AIF.

The CBD also refers to the "indirect" provision of information, highlighting that AIFMs will also have to monitor activities of their group entities or distributors in this respect.

4. Notification Requirements

Although AIFMs shall not be required to make filings or notifications to their competent authority before engaging in pre-marketing, the CBD does introduce an obligation for AIFMs to notify authorities after pre-marketing has begun. This is a substantial change which AIFMs will need to monitor since no such notification was required by the AIFMD prior to the CBD.

More specifically, the CBD requires AIFMs to send, within two weeks following the beginning of pre-marketing, an informal letter (paper or electronic) to their competent authorities specifying: (i) the Member State(s) in which

13. AIFMD (New), Art. 30a(1)(b).
14. AIFMD (New), Art. 30a.
15. AIFMD (New), Art. 30a(2), 3rd paragraph.
16. "Marketing" shall therefore be subject to the applicable notification procedure, i.e., subject to the AIFMD marketing procedure.
17. Indeed, "reverse solicitation" is currently defined by the CSSF FAQ on AIFMD as follows: "providing information regarding an AIF and making units or shares of that AIF available for purchase to a potential investor following an initiative of that investor (or an agent of that investor) without any solicitation made by the AIF or its AIFM (or an intermediary acting on their behalf) in relation to the relevant AIF". Hence, it is not possible to rely on reverse solicitation following the communication of draft constitutional documents by an AIFM to a prospect during the pre-marketing phase.

and the periods during which the pre-marketing is taking or has taken place, (ii) a brief description of the pre-marketing including information on the investment strategies presented and, where relevant, (iii) a list of the AIFs/compartments which are or were the subject of pre-marketing.[18]

Akin to the AIFMD "regulator-to-regulator" procedure, the new pre-marketing notification shall be filed by AIFMs to their competent authorities, which will then pass along the information to the competent authorities of the host Member State(s). These authorities will have the possibility to request the authorities of the home Member State for information on the pre-marketing which is taking or has taken place on their territory, which means that AIFMs may be required to account for their pre-marketing activities in the various Member States at various times. Unfortunately, the CBD does not provide a limit on the information that may be requested by these authorities.

Finally, the CBD requires that pre-marketing be "adequately documented". This requirement is rather vague and will need to be clarified by Member States. It is likely to require an update of the AIFMs' marketing procedures and reinforced monitoring from the AIFM on the pre-marketing process, which will need to be properly documented and recorded.

Given the breadth of the definition of pre-marketing, AIFMs will need to carefully assess the type of activities conducted by themselves, entities of their group or third parties and that qualify as pre-marketing and will need to monitor this two weeks' notification delay, especially when providing limited information on "investment strategies" or "investment ideas" of an AIF that has yet to be formed.

5. Limitation on Professionals Permitted to Engage in Pre-Marketing

The CBD has imitatively spelled out the professionals that will be permitted to engage in pre-marketing activities. These professionals shall be **investment firms** and their **tied agents** (subject to Directive 2014/65/EU), **credit institutions** (subject to Directive 2013/36/EU), **UCITS management companies** (subject to Directive 2009/65/EC) and **AIFMs** (subject to the AIFMD).

One may question the opportunity of this limitation as investors will not be able to subscribe to an AIF during its pre-marketing and it is difficult to see where the pre-marketing of shares/units in an AIF may cause a risk to investors justifying this limitation. This restriction is, however, clearly spelled out and AIFMs will need to check that the third parties pre-marketing AIFs that they manage to hold the proper licenses.

6. Open Questions on the Definition of Pre-Marketing

Each new rule raises questions of interpretation. Among these, the references to "professional investors" and to "EU AIFMs" in the definition of pre-marketing raises questions regarding the application of these new rules to non-professional investors (a)) and to non-EU AIFMs.

a) Non-Professional Investors

The new definition of pre-marketing only mentions professional investors. It is uncertain whether this reference should be interpreted as also prohibiting any form of pre-marketing to retail investors.

Although one may assume that the intention of the legislator was not to be less restrictive for retail investors than for professional investors, pre-marketing to high-net-worth individuals (which may or may not qualify as professional investors) is not uncommon. Member States or ESMA will need to provide guidance on whether approaching such investors outside of a formal marketing notification may or may not continue.

Moreover, certain Member States have recognised categories of investors between professional and retail (such as "semi-professional investors" in Germany (*Semiprofessioneller Anleger*, as defined in Article 1(19)(point 33) KAGB) and it will need to be confirmed how those Member States will include pre-marketing in those categories.

7. Non-EU AIFMs

The definition of pre-marketing only contains a reference to EU AIFMs, which has raised the question of the treatment of non-EU AIFMs. Recital (12) CBD provides that "harmonised rules on pre-marketing, should not in any way disadvantage EU AIFMs vis à vis non-EU AIFMs". The CBD itself does not explain how such a level playing field should be achieved, leaving it at the discretion of the Member States to address.

Luxembourg, through its Bill of law 7737, is proposing that non-EU AIFMs be treated no differently than EU AIFMs.

18. AIFMD (New), Art. 30a(2), 2nd paragraph.

The commentary of the articles provides that: "Ainsi, si un gestionnaire de FIA établi dans un pays tiers souhaite entreprendre des activités de pré-commercialisation au Luxembourg, il est tenu de se conformer à des dispositions similaires à celles prévues pour les gestionnaires de FIA établis dans l'Union européenne."

The CBD may therefore be implemented in various manners by the Member States, and non-EU AIFMs will need to check in each country what the exact scope of permitted activities is.

II. HARMONISED RULES FOR THE DE-NOTIFICATION AND DISCONTINUATION OF MARKETING OF AIFS

Notifying an AIF under the AIFMD marketing passport is not a costless operation. Various levels of fees are charged by local authorities (including one-off and annual fees) simply because an AIF has made use of the AIFMD marketing passport in the relevant Member State.

Because of the existence of these costs, an AIF that has completed its fundraising period, or simply that has not noticed investor appetite in a given Member State, will often seek to cancel its marketing passport.

The AIFMD has not regulated such discontinuation of marketing of AIFs, which has led to various practices throughout the EU and uncertainties as to the possibilities of proceeding to de-notification and to the required procedure.

The CBD seeks to remedy this gap by providing for a harmonised de-notification process (II. B.) which is subject to several prerequisites (II. A.) and limitations as to further pre-marketing activities (II. C.).

A. Pre-Requisites to Discontinuing the Marketing of an AIF

For open-ended AIFs only (other than ELTIFs), a "blanket offer" (to be made publicly available and addressed individually to all known investors at least 30 days before deregistration) shall be made to repurchase (free of charge) all of the AIF's units/shares held by investors in the Member State(s) where the AIFM intends to deregister the AIF for marketing.[19] Thankfully, closed-ended funds are exempt from the obligations to grant this redemption offer.

However, this does not mean that investors in a Member State should be redeemed from an AIF in case the latter is de-notified: the CBD confirms that it will be possible to still have investors in that country, as long as investors have been provided with the possibility to redeem their units/shares of the relevant AIF and continue to be provided with information under Articles 22 and 23 AIFMD.[20] Local authorities shall also receive this information, presumably as long as investors in its Member State remain invested in the AIF, although this is not explicitly mentioned in the CBD.

The CBD does not specify what is meant by a "publicly available" blanket offer (i.e., it is unclear whether a publication on the AIFM's website shall be sufficient or if a Member State may require other forms of publicity, such as notices in newspapers). In addition, the AIFM must reach out to end investors individually, where the identity of such investors is known, even if such investors are invested in the AIF through financial intermediaries (such as nominees).

The AIFM shall also make public[21] its intention to terminate arrangements made for marketing in the relevant Member States. Interestingly enough, for this formality the CBD provides guidance on the format of such publication and provides that it shall be made "by means of a publicly available medium, including by electronic means, which is customary for marketing AIFs and suitable for a typical AIF investor".

Contractual arrangements with financial intermediaries or delegates should be modified or terminated with effect from the date of marketing discontinuation,[22] to avoid that the shares/units of the relevant AIF continue to be offered or placed following the discontinuation of marketing. From that date the AIFM shall, moreover, be prohibited from continuing to offer or place shares/units of the deregistered AIF in the relevant Member State, unless it makes a new marketing notification.

B. Discontinuation Notification and Implications

In order to deregister an AIF from marketing in a given Member State, AIFMs shall submit a notification to its competent authorities containing the information provided in the previous paragraph.[23]

19. AIFMD (New), Art. 32a(1)(a).
20. AIFMD (New), Art. 32(a)(4).
21. AIFMD (New), Art. 32a(1)(b).
22. AIFMD (New), Art. 32a(1)(c).
23. AIFMD (New), Art. 32a(2).

Following receipt of a complete marketing discontinuation file,[24] the AIFM's competent authorities shall, within 15 days, transmit the file to the competent authorities of the relevant host Member State(s) and to ESMA and promptly notify the AIFM thereof.[25]

The CBD provides that as from the date of transmission, the competent authorities of the host Member State "shall not require the AIFM concerned to demonstrate compliance with national laws, regulations and administrative provisions governing marketing requirements as referred to in Article 5"[26] of the CBR.

It remains to be confirmed in practice if such de-notification will release AIFMs from paying any form of fees to the competent authorities of former host Member States, especially in light of the continued information obligations of AIFMs where investors in those jurisdictions remain invested in the de-notified AIF.

C. Limitations to Further Pre-Marketing Activities

For 36 months from the date of the marketing discontinuation, the AIFM shall not be permitted to engage in:

(i) Pre-marketing of units/shares of the AIFs/compartments referred to in the marketing discontinuation file; and

(ii) Pre-marketing of similar investment strategies or investment ideas in the same Member State(s).[27]

This latter prohibition, if applied strictly, will be burdensome for AIFMs managing illiquid strategies which generally involve the launch of new vintages on a regular basis. In practice, a literal application of this provision would mean that AIFMs would not be able to test investor appetite or generally submit to investors draft documents relating to a new vintage AIF that they intend to launch in a Member State from which they have de-notified a previous vintage.

Depending on the interpretation that Member States or ESMA will make of "similar investment strategies", this prohibition might also limit the ability of AIFMs to pre-market ancillary vehicles such as co-investment AIFs that are linked to an AIF which has been de-notified.

AIFMs should therefore carefully consider the opportunity of ending the notification of an AIF in a given jurisdiction depending on , *inter alia*, further fund-raising intentions, and monitor how this rule will actually be implemented by the various Member States.

III. CLARIFICATION OF ADDITIONAL LOCAL MARKETING REQUIREMENTS

The purpose of the CBR is to tackle divergent regulatory and supervisory approaches in the EEA concerning certain aspects of the cross-border distribution of AIFs and UCITS. In particular, the CBR focuses on divergent approaches in terms of marketing communications addressed to investors in AIFs and UCITS and aims at harmonising applicable rules in the EEA (III. A.). It also aims at increasing transparency of local rules and practices applicable to the distribution of AIFs (III. B.).

A. New Requirements Applicable to Marketing Communications

Unlike the UCITS Directive, the AIFMD does not contain high-level principles governing the content of AIF marketing communications. The current intention of the EU Commission is to seek alignment and consistency between UCITS and AIFs in terms of marketing communications. Therefore, the CBR provides that AIF marketing communications shall:

- Be "identifiable as such and describe the risks and rewards of purchasing units or shares of an AIF" and AIFMs shall ensure "that all information included in marketing communications is fair, clear and not misleading";[28] and
- Not contradict information contained in Article 23 of AIFMD nor diminish its significance.[29]

ESMA is mandated to issue guidelines by August 2, 2021, on the application of the above requirements (including online aspects) and launched in this respect a consultation paper in which interested stakeholders were required to provide feedback before February 8, 2021.[30]

According to ESMA, the purpose of the implementation of new requirements is "to ensure that the information contained in all marketing communications is balanced, understandable, not confusing to investors or potential investors, and is consistent with, and not contrary to, the legal and regulatory documentation of the pro-

24. Unfortunately, the Directive does not specify the format of the notification, which is left open for the relevant authorities to clarify. It will be interesting to see whether an email is sufficient or if a specific form will need to be used.
25. AIFMD (New), Art. 32a(3)§2.
26. AIFMD (New), Art. 32a(7).
27. AIFMD (New), Art. 32a(3).
28. CBR, Art. 4(1).
29. CBR, Art. 4(4).
30. ESMA Consultation Paper Guidelines on marketing communications under the Regulation on cross border distribution of funds (ESMA34-39-926).

moted fund". ESMA specifically required feedback in its consultation paper on information regarding (i) risks and rewards, (ii) costs, (iii) past and expected future performance, and (iv) sustainability-related aspects.

AIFMs marketing units or shares of the AIFs they manage to EEA retail investors shall, moreover, be subject to the requirements of Article 7 of the CBR, according to which competent authorities can require prior notification of marketing communications for the purpose of verifying compliance with applicable requirements. The relevant competent authorities would then have 10 working days to indicate to an AIFM their request to amend the marketing communication.

For now, the CSSF has not indicated that it would make use of this possibility nor amend its Circular 05/177[31] which had abolished the prior control by the CSSF of "the content of their advertising messages intended for distribution to their clients or to the public, [and] in particular, advertising material used by persons in charge of the distribution of units of undertakings for collective investment".

B. Transparency

Despite the AIFMD's objective of creating a single market for the distribution of AIFs to professional investors, Member States continue to have various local requirements (e.g., marketing rules, registration fees, reporting, and appointment of local agents,...) that fragment the single market and force AIFMs to assess rules applicable to distribution of AIFs on a country-by-country basis.

Rather than seeking further harmonization of national practices, the CBR has resolved to seek to facilitate this country-by-country analysis by increasing the transparency of additional local rules (III. B. 1.) and of regulatory fees (III. B. 2.).

1. Transparency of Local Marketing Requirements

Further to Article 5 of the CBR, competent authorities shall thus be required to:

- Publish and maintain on their websites up-to-date and complete information on the applicable national laws, regulations and administrative provisions governing marketing requirements for AIFs and UCITS, and the summaries thereof, in, as a minimum, a language customary in the sphere of international finance;[32] and
- Notify ESMA of the hyperlinks to the websites of competent authorities where the foregoing information is published and notify ESMA of any changes thereof.

ESMA shall by February 2, 2022, at the latest publish on its website (i) hyperlinks to each relevant authorities' website[33], and (ii) a database listing all AIFs marketed in the EU, their AIFMs and the Member State(s) in which they are marketed.[34]

ESMA has also published draft implementing technical standards[35] notably composing drafts of (i) a template for the publication of the summaries of national provisions governing marketing requirements for AIFs, (ii) templates for notifications by NCAs to ESMA of the website where the relevant information required by CBD is available, and (iii) a template table for the data to be provided by NCAs to ESMA for its AIF database.

Despite this increased transparency, it shall remain the responsibility of the AIFM to ensure compliance with local rules governing marketing of AIFs and it is unlikely that an AIFM could argue that it is not liable for a breach of applicable law even where such law would have been badly referenced (or not referenced at all) on the website of the competent authority.

2. Transparency of Local Regulatory Fees

As mentioned in Section 2 above, notifying an AIF under the AIFMD marketing passport comes with a cost and such cost varies (sometimes substantially) amongst Member States. Various types of costs are charged (e.g., one-off fees and/or annual charges) and various levels of fees are applied.

Considering the diversity of administrative practices among competent authorities, it is not always clear to AIFMs when and what they should pay to competent authorities.

In order to increase transparency of AIFMs, the CBR has set out some common principles applicable to fees and

31. CSSF Circular 05/177 on the abolition of any prior control by the CSSF of advertising material used by persons and companies supervised by the CSSF.
32. CBR, Art. 5.
33. CBR, Art. 11(1).
34. CBR, Art. 12.
35. ESMA Final Report Draft implementing technical standards under the Regulation on cross border distribution of funds, January 29, 2021 (ESMA34-39-961).

charges payable to competent authorities. Article 9 of the CBR requires Member States to ensure that:

– Where fees or charges are levied by competent authorities for carrying out their duties in relation to the cross-border activities of AIFMs [...], such fees or charges shall be consistent with the overall cost relating to the performance of the functions of the competent authority; and

– Competent authorities shall send an invoice, an individual payment statement or a payment instruction, clearly setting out the means of payment and the date when payment is due, to the AIFM at its address referred to in point (i) of Annex IV of Directive 2011/61/EU.

Moreover, competent authorities had to publish as of 2 February 2020 information on their websites on the applicable marketing fees and are required to maintain such information up to date.[36]

ESMA has also published draft implementing technical standards[37] notably comprising drafts of a template for the publication of regulatory fees and charges.

Moreover, Article 11 of the CBR requires ESMA to publish on its website (by February 2, 2022) hyperlinks to the websites of competent authorities where information on fees and charges may be found. ESMA shall also (by February 2, 2022) develop, make available on its website and keep up to date an interactive tool publicly accessible that provides an indicative calculation of the fees or charges payable to competent authorities.

IV. ADDITIONAL REQUIREMENTS FOR EXISTING MARKETING PROCEDURES

The CBD introduces new minimum rules applicable to the marketing of AIFs to retail investors (IV. A.). It also clarifies certain requirements relating to material changes to information communicated to competent authorities in the context of the marketing notification procedure (IV. B.).

A. Facilities to Be Made Available to Retail Investors

The AIFMD originally contained a few provisions on marketing to retail investors, the AIFMD marketing passport being available only for professional investors. Article 43 AIFMD only provides that Member States may, in their discretion, allow AIFMs to market units/shares of AIFs to retail investors in their territory and can in this respect impose stricter requirements to the relevant AIFM or AIF than the requirements applicable to AIFs marketed to professional investors.

In Luxembourg, Article 46 of the AIFM Law provides that, in order for an AIFM to market the units/shares of an AIF in Luxembourg, the relevant AIF must be subject to a permanent supervision in its home state by a supervisory authority and be subject to a regulation providing investors guarantees of protection at least equivalent to those provided by Luxembourg laws governing AIFs authorised to be marketed to retail investors, provided that cooperation is ensured between the CSSF and the supervisory authority of the AIF. For the time being, Luxembourg has not, for the purpose of this rule and unlike other Member States, made any distinction between retail investors based on their sophistication. Other requirements may apply in other Member States.

The CBD adds new requirements applicable to AIFMs offering units or shares of an AIF to retail investors, in order to guarantee a uniform treatment of retail investors who invest in UCITS or in AIFs.[38] It does not go as far, however, as providing a framework nor an extension of the marketing passport for marketing AIFs to retail investors.

The CBD now requires AIFMs to make available facilities in each Member State where retail investors are offered units/shares of the relevant AIF, in order to:[39]

i. Process investors' subscription, payment, repurchase and redemption orders relating to the units or shares of the AIF, in accordance with the conditions set out in the AIF's documents;

ii. Provide investors with information on how orders referred to in point (a) can be made and how repurchase and redemption proceeds are paid;

iii. Facilitate the handling of information relating to the exercise of investors' rights arising from their investment in the AIF in the Member State where the AIF is marketed;

iv. Make the information and documents required pursuant to Articles 22 and 23 of AIFMD available to investors for the purposes of inspection and obtaining copies thereof;

36. CBR, Art. 10.
37. ESMA Final Report Draft implementing technical standards under the Regulation on cross border distribution of funds, January 29, 2021 (ESMA34-39-961).
38. CBD, recital (6).
39. AIFMD (New), Art. 43(a)(1).

v. Provide investors with information relevant to the tasks that the facilities perform in a durable medium as defined in point (m) of Article 2(1) of Directive 2009/65/EC; and

vi. Act as a contact point for communicating with the competent authorities.

The CBD prohibits Member States from requiring a physical presence of an AIFM in their territory or requiring the appointment of a third party (local representative) in order to perform the services mentioned under i. to vi. above[40] and AIFMs are authorised to provide these services electronically[41]. However, facilities should be provided in the official language of the Member State or in a language approved by the competent authorities of that Member State and shall be provided by the AIFM itself or a third party which must be subject to regulation and supervision governing the tasks to be performed and appointed pursuant to a written contract.

The information to be provided to regulatory authorities under Annex IV of the AIFMD has also been amended to require AIFMs to provide details on these facilities.[42]

With respect to ELTIFs,[43] the above requirements already apply and the situation shall not change.[44]

It is also worth noting that these requirements will continue to apply on top of other EU regulations applying to marketing or offerings to retail investors, such as the PRIIPs Regulation,[45] or the Prospectus Regulation in case securities are offered to the public by certain closed-ended AIFs.

B. New Delays for the Notification of Planned Material Changes in Case the AIFM's Management of the AIF Would No Longer Comply with the AIFMD

Under current AIFMD rules, an AIFM shall inform its competent regulatory authority in the event of a material change to any information communicated in the context of the marketing notification procedure, either at least one month before implementing any planned change or immediately after an unplanned change has occurred. The relevant competent authority shall then inform the AIFM if it is not allowed to implement such change, should it no longer comply with AIFMD.[46]

There is no harmonized definition of what constitutes a "material" change, and while some countries have developed precise rules in this respect others (such as Luxembourg) have deferred this materiality assessment to the AIFMs.

The CBD does not bring further guidance on the definition of a "material" change and therefore it is not expected that current practice with respect to material changes will change.

However, the CBD specifies that the relevant competent authorities of an AIFM shall inform it within 15 working days following receipt of the relevant information on a material change should it not be allowed to implement such change, and also notify the competent authorities of the host Member State(s) of the AIFM accordingly.[47] The CBD also provides that, following the implementation of a planned or unplanned material change according to which the AIFM will no longer comply with AIFMD, the relevant authorities shall notify the competent authorities of the host Member State of the AIFM accordingly without undue delay. Although there are no widely available figures on how often sanctions are taken by relevant authorities against AIFs further to the implementation of planned or unplanned changes which would not conform to AIFMD, it seems logical that the competent authorities of Member States where an AIF is marketed are informed of these measures.

The same process has also been updated for AIFMs managing AIFs in a host Member State, either directly or by establishing a branch.[48]

V. CONCLUSION

Whilst the alleged purpose of the CBD and the CBR is to remove barriers hampering the ability of fund managers to fully benefit from the internal market for the distribution of AIFs to professional investors, it is yet to be confirmed whether these new rules will actually allow

40. AIFMD (New), Art. 43(a)(2).
41. AIFMD (New), Art. 43a(3).
42. CBD, Art. 2(8).
43. European Long-Term Investment Funds ("**ELTIFs**") under regulation (EU) 2015/760 of the European Parliament and of the Council of April 29, 2015 (the "**ELTIF Regulation**").
44. See Art. 5 of Commission Delegated Regulation (EU) 2018/480 of December 4, 2017, supplementing the ELTIF Regulation with regard to regulatory technical standards on financial derivative instruments solely serving hedging purposes, sufficient length of the life of the ELTIFs, assessment criteria for the market for potential buyers and valuation of the assets to be divested, and the types and characteristics of the facilities available to retail investors.
45. Regulation (EU) No 1286/2014 of the European Parliament and of the Council of November 26, 2014, on key information documents for packaged retail and insurance-based investment products (the "**PRIIPs Regulation**") *O.J.*, L 352, 9 December 2014.
46. AIFMD, Art. 31(4) and 32(7).
47. AIFMD (New), Art. 32(7).
48. AIFMD (New), Art. 33(6).

to achieve this purpose. Although the new rules governing pre-marketing may be a progress for Member States that had a restrictive approach, they will be more restrictive (sometimes substantially) for Member States that had taken a more liberal approach.

A number of concepts used in the CBD and CBR are not defined meaning that their practical application will again depend on the interpretation by the various Member States, resulting in differences in interpretation and application depending on the Member States.